

No. 11634

United States
Circuit Court of Appeals
For the Ninth Circuit

J. D. KECK and HARRY K. STAHLER, and
E. A. EMERSON and LEWIS EMERSON,
husband and wife,

Appellants,

vs.

CALIFORNIA SPRAY - CHEMICAL CORPO-
RATION, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Southern Division

FILED

SEP 20 1947

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J. D. KECK and HARRY K. STAHLER, and
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

BROWN & HAWKINS,

Miller Building,
Yakima, Washington.

Attorneys for Plaintiff and Appellant.

SKEEL, McKELVEY, HENKE, EVENSON &
UHLMANN,

Insurance Building,
Seattle 4, Washington.

Attorneys for Defendant and Appellee.

In the Superior Court of the State of Washington,
in and for Yakima County

Court No. 33700

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

COMPLAINT

Come now the above-named plaintiffs and for
cause of action against the defendant allege:

1.

That the plaintiff J. D. Keck is the owner and
the plaintiff Harry K. Stahler is the tenant occu-
pying the following described real estate located in
the County of Yakima, State of Washington, to-
wit:

The south half of the northeast quarter and
the northeast quarter of the southeast quarter
of Section 11, Township 14 North, Range 17,
E.W.M.

That the said tract of land is planted to a com-
mercial orchard and that the plaintiffs jointly own
the crop of fruit now growing thereon.

2.

That the defendant is engaged in the business in
Yakima County, Washington, of distributing vari-

ous types of orchard spray, including a spray known as "Elgetol 30". That in the Spring 1945, the plaintiffs were interested in securing a spray for the control of mildew in the Jonathan, Rome Beauty and Winesap orchards on the above-described premises and that in connection therewith the plaintiff Stahler consulted with an officer and agent of said corporation, namely, William S. Regan, chemical and technical adviser [1*] of said defendant corporation, and was advised by him that the said Elgetol 30, when properly mixed and applied, would be effective in the control of mildew.

3.

That the plaintiff Stahler was advised by said Regan how to mix said spray and how to apply the same.

4.

That the plaintiffs followed the instructions of the agent of said defendant corporation and mixed and applied said spray as directed by it and that as a result of said application as directed by the defendant corporation all the blossoms on the Jonathan orchard and a large portion of the blossoms on the Rome Beauty and Winesap orchards located upon the above described premises were totally destroyed. That the said defendant corporation, its officers and agents, knew or should have known that such a result would ensue.

* Page numbering appearing at foot of page of original certified Transcript of Record.

5.

That by reason of the destruction of said blossoms the production of said orchards was reduced by more than 5000 boxes of Jonathan apples, more than 5000 boxes of Rome Beauty apples and more than 5000 boxes of Winesap apples, which would have netted the plaintiffs, over and above all costs of operation, harvesting, packing, etc., not less than \$36,346.64, all to plaintiffs' damage in that amount.

Wherefore, plaintiffs pray for judgment against the defendant for the sum of \$36,346.64, together with their costs and disbursements herein.

BROWN & HAWKINS,
Attorneys for Plaintiffs. [2]

State of Washington,
County of Yakima—ss.

J. D. Keck, being first duly sworn on oath, deposes and says: That he is one of the plaintiffs above named; that he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

J. D. KECK.

Subscribed and sworn to before me this 1st day of September, 1945.

NAT. U. BROWN,
Notary Public in and for the State of Washington,
residing at Yakima.

[Endorsed]: Filed D. S. Oct. 11, 1945. [3]

In the Superior Court of the State of Washington,
in and for Yakima County

Court No. 33734

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,

Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

COMPLAINT

Come now the above-named plaintiffs and for
cause of action against the defendant allege:

1.

That the plaintiffs are the owners of the follow-
ing described real property situate in the County of
Yakima, State of Washington, to-wit:

North half of northwest quarter of the south-
west quarter of the northwest quarter, and the
northwest quarter of the northeast quarter of
the northwest quarter; and the west half of the
southwest quarter of the northeast quarter of
the northwest quarter, all in Section 33, Town-
ship 13 North, Range 17 E.W.M., and

North half of northeast quarter of the north-
east quarter of the northeast quarter, and south-
east quarter of the northeast quarter of the
northeast quarter, Section 12, Township 14
North, Range 16 E.W.M., and

South half of southeast quarter of southeast

quarter of Section 1, Township 14 North, Range 16 E.W.M.

That said real property is planted to a commercial orchard and the plaintiffs own the crop of fruit now growing thereon.

2.

The defendant is engaged in the business in Yakima County, Washington, of distributing various types of orchard spray, including a spray known as "Elgetol 30." That in the Spring of 1945 the plaintiffs were interested in securing a spray for the control of mildew in the Jonathan, [4] Winesap and Delicious orchards on the above-described property and that in connection therewith the plaintiffs consulted with an officer and agent of said corporation, namely, William S. Regan, chemical and technical adviser of said defendant corporation, and was advised by him that the said Elgetol 30, when properly mixed and applied, would be effective in the control of mildew.

3.

That the plaintiffs were advised by said Regan how to mix said spray and how to apply the same.

4.

That the plaintiffs followed the instructions of said agent of said defendant corporation and mixed and applied said spray as directed by it and that as a result of said application as directed by the defendant corporation, substantially all the blossoms, calyx and apples on the Jonathan orchard and a large portion of the blossoms, calyx and ap-

ples on the Winesap and Delicious orchards located upon the above-described premises, were totally destroyed. The said defendant corporation, its officers and agents, knew or should have known, that such a result would ensue.

5.

By reason of the destruction of said crop the production of said orchard was reduced by more than 18,900 boxes of apples, which would have netted the plaintiffs, over and above all costs of operation, harvesting, packing, etc., not less than \$33,075.00, all to plaintiffs' damage in that amount.

Wherefore, plaintiffs pray for judgment against the defendant for the sum of \$33,075.00, together with their costs and disbursements herein.

BROWN & HAWKINS,

Attorneys for Plaintiffs. [5]

State of Washington,
County of Yakima—ss.

E. A. Emerson, being first duly sworn on oath, deposes and says: That he is one of the plaintiffs above named; that he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

E. A. EMERSON.

Subscribed and sworn to before me this 29th day of September, 1945.

KENNETH C. HAWKINS,

Notary Public in and for the State of Washington,
residing at Yakima.

[Endorsed]: Filed D. C. Oct. 11, 1945. [6]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,
Defendant.

ANSWER

Comes now the defendant and for answer to the plaintiffs' complaint, admits, denies and alleges as follows:

I.

Answering paragraph I of the complaint, this defendant has no information sufficient to form a belief as to the truth and veracity of the allegations therein contained and, therefore, denies the same.

II.

Answering paragraph II of the complaint, the defendant admits that it was in the business of distributing certain orchard sprays in the spring of 1945, including a product known as "Elgetol 30"; otherwise denies each and every allegation of said paragraph.

III.

Answering paragraphs III, IV and V of the complaint, the defendant denies each and every allegation in said paragraphs contained.

By Way of a Further Answer and Affirmative Defense, the defendant alleges: That if the plaintiffs sustained any damages to the orchards as alleged or otherwise, the same were caused by reason of no negligence on the part of this defendant but were caused by reason of the negligence of the plaintiffs themselves proximately contributing thereto in that the plaintiffs failed to use the product complained of in the plaintiffs' complaint in the proper manner and failed to use it properly mixed, made an excessive application of said product, failed to spray at the proper time, and failed to [7] give any consideration to the weather conditions when using said product.

Wherefore, having fully answered plaintiffs' complaint, defendant prays that said complaint be dismissed and that it be awarded its costs of suit herein to be taxed.

W. R. McKELVY.

SKEEL, McKELVY, HENKE,
EVERSON & UHLMANN,
Attorneys for Defendant.

Copy received of the foregoing Answer this 6th day of November, 1945.

NAT. U. BROWN and
KENNETH C. HAWKINS.

[Endorsed]: Filed Nov. 13, 1945. [8]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 242

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,

Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

ANSWER

Comes now the defendant and for answer to the
plaintiffs' complaint, admits, denies and alleges as
follows:

I.

Answering paragraph 1 of the complaint, this
defendant states that it has no information suffi-
cient to form a belief as to the truth and veracity
of the allegations therein contained, and, therefore,
denies the same.

II.

Answering paragraph 2 of the complaint, defend-
ant admits that it was in the business of distrib-
uting certain orchard sprays in the spring of 1945,
including a product known as "Elgetol 30"; other-
wise denies each and every allegation of said para-
graph.

III.

Answering paragraphs 3, 4 and 5 of the complaint, the defendant denies each and every allegation in said paragraphs.

By Way of a Further Answer and Affirmative Defense, the defendant alleges:

I.

That if the plaintiffs sustained any damages to the orchards as alleged or otherwise, the same were caused by reason of no negligence on the part of this defendant, but were caused by reason of the negligence of the [9] plaintiffs themselves proximately contributing thereto in that the plaintiffs failed to use the product complained of in the plaintiffs' complaint in the proper manner and failed to use it properly mixed, made an excessive application of said product, failed to spray at the proper time, and failed to give any consideration to the weather conditions when using said product.

By Way of a Further Answer and as a Second Affirmative Defense, the defendant alleges:

I.

That the product "Elgetol 30" referred to in plaintiffs' complaint is a commercial orchard spray product manufactured and packaged by Standard Agricultural Chemicals, Inc., of Hoboken, New Jersey; that said product is distributed and sold to the public in the original package and container as

packaged by the said manufacturer; that the said product is labeled in a conspicuous manner, and said label, among other things, contains the following provision, to-wit:

“Notice: The use of this material being subject to conditions beyond their control, neither the manufacturer nor the seller, make any warranty with respect to results from such use, whether or not such use is in accordance with the directions. The buyer accepts and uses this material subject to these terms and shall not hold either the manufacturer or seller liable for the results of any use of this material.”

That the use of said product by plaintiffs was subject to the foregoing waiver and provision, and said waiver and provision were known to the plaintiffs in using said product.

Wherefore, having fully answered plaintiffs' complaint, defendant prays that said complaint be dismissed and that it be awarded its costs of suit herein to be taxed.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,
W. R. McKELVY,
Attorneys for Defendant.

Copy received of the foregoing Answer this 17th day of January, 1946.

NAT. U. BROWN and
KENNETH C. HAWKINS,
Attorneys for Plaintiffs.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Court No. Civil 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,
Defendant.

REPLY

Come now the plaintiffs above named and for
reply to the answer of the defendant admit, deny
and allege as follows:

1.

For reply to the affirmative defense of the defend-
ant plaintiffs deny the same and each and every alle-
gation therein contained.

Wherefore, plaintiffs having fully replied to the
answer of the defendant, pray that the prayer of
their complaint be granted and that judgment be
entered accordingly.

NAT. U. BROWN,
KENNETH C. HAWKINS,
BROWN & HAWKINS,
Attorneys for Plaintiffs.

Filed Nov. 7, 1945. [11]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 242

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,

Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

REPLY

Come now the plaintiffs above named and for
reply to the answer of the defendant, admit, deny
and allege as follows:

1.

For reply to paragraph 1 of defendant's first
affirmative defense plaintiffs deny each and every
allegation therein contained.

2.

For reply to paragraph I of defendant's second
affirmative defense plaintiffs deny each and every
allegation therein contained.

Wherefore, having fully replied to defendant's
answer plaintiffs pray that the prayer of their com-
plaint be granted.

NAT. U. BROWN,
KENNETH C. HAWKINS,
Attorneys for Plaintiffs.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

STIPULATION

Come now the plaintiffs and the defendant above
named by and through their respective attorneys
and stipulate as follows:

1. Plaintiffs' complaint may be and by this stipu-
lation is hereby amended as follows:

“Paragraph 4a. Plaintiffs gave due notice
to the defendant of the injurious effect of said
Elegtol upon said crops.”

2. Defendant may file herein an amended answer,
a copy of which is attached hereto.

Dated this 3rd day of January, 1946.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Plaintiffs.

W. R. McKELVY,

By A. P. CURRY,

Attorneys for Defendant.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 242

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,

Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

STIPULATION

Come now the plaintiffs and defendant by and
through their attorneys and stipulate as follows:

1. Plaintiffs' complaint may be and by this stip-
ulation is hereby amended by adding to said com-
plaint the following:

“Paragraph 4a. Plaintiffs gave due notice
to the defendant of the injurious effect of said
Elgetol upon said crops.”

2. The answer of the defendant may be and by
this stipulation is hereby amended as follows:

“Paragraph IV. Answering paragraph 4a
of plaintiffs' complaint as amended defendant
denies each and every allegation in said para-
graph.”

Dated this 23rd day of January, 1946.

NAT. U. BROWN,
KENNETH C. HAWKINS,
Attorneys for Plaintiffs.

W. R. McKELVY,
By A. P. CURRY,
Attorneys for Defendant.

Filed Jan. 24, 1946. [14]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,
vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,
Defendant.

AMENDED ANSWER

Comes now the defendant and for answer to the
plaintiffs' complaint, admits, denies and alleges as
follows:

I.

Answering paragraph I of the complaint, this
defendant has no information sufficient to form a
belief as to the truth and veracity of the allegations
therein contained, and, therefore, denies the same.

II.

Answering paragraph II of the complaint, the defendant admits that it was in the business of distributing certain orchard sprays in the spring of 1945, including a product known as "Elgetol 30"; otherwise denies each and every allegation of said paragraph.

III.

Answering paragraphs III, IV and V of the complaint, the defendant denies each and every allegation in said paragraphs contained.

By Way of a Further Answer and Affirmative Defense, the defendant alleges:

I.

That if the plaintiffs sustained any damages to the orchards as alleged or otherwise, the same were caused by reason of no negligence on the part of this defendant, but were caused by reason of the negligence of the plaintiffs themselves proximately contributing thereto in that the plaintiffs [15] failed to use the product complained of in the plaintiffs' complaint in the proper manner and failed to use it properly mixed, made an excessive application of said product, failed to spray at the proper time, and failed to give any consideration to the weather conditions when using said product.

By Way of a Further Answer and as a Second Affirmative Defense, the defendant alleges:

1.

That the product "Elgetol 30" referred to in plaintiffs' complaint is a commercial orchard spray product manufactured and packaged by Standard Agricultural Chemicals, Inc., of Hoboken, New Jersey; that said product is distributed and sold to the public in the original package and container as packaged by the said manufacturer; that the said product is labeled in a conspicuous manner, and said label among other things contains the following provision, to-wit:

"Notice: The use of this material being subject to conditions beyond their control neither the manufacturer nor the seller, make any warranty with respect to results from such use, whether or not such use is in accordance with directions. The buyer accepts and uses this material subject to these terms and shall not hold either the manufacturer or seller liable for the results of any use of this material."

That the use of said product by plaintiffs was subject to the foregoing waiver and provision, and said waiver and provision were known to the plaintiffs in using said product.

Wherefore, having fully answered plaintiffs' complaint, defendant prays that said complaint be dis-

missed and that it be awarded its costs of suit herein to be taxed.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

W. R. McKELVY,
Attorneys for Defendant.

Copy received of the foregoing Answer this 17th day of January, 1946.

NAT. U. BROWN and
KENNETH C. HAWKINS,
Attorneys for Plaintiffs.

Filed Jan. 29, 1946. [16]

[Title of District Court and Cause.]

REPLY TO DEFENDANT'S AMENDED
ANSWER

Come now the plaintiffs above named and for reply to defendant's amended answer, admit, deny and allege as follows:

1.

For reply to paragraph I of defendant's first affirmative defense, plaintiffs deny each and every allegation therein contained.

2.

For reply to paragraph I of defendant's second affirmative defense plaintiffs deny each and every allegation therein contained.

Wherefore, having fully replied to defendant's amended answer, plaintiffs pray that the prayer of their complaint be granted.

NAT. U. BROWN,
KENNETH C. HAWKINS,
Attorneys for Plaintiffs.

Filed Feb. 6, 1946.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

No. 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

and

No. 242

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,

Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

(Consolidated)

RECORD OF PROCEEDINGS AT THE TRIAL

January 27, 1947

Before: Honorable Sam M. Driver,

United States District Judge. [18]

Be It Remembered, that on the 27th day of Jan-
uary, 1947, the above entitled causes, having been
consolidated for the purpose of trial, came regu-
larly on for trial in the above court at Yakima,

Washington, before the Honorable Sam M. Driver, Judge of the above-entitled Court, sitting with a jury; [23]

The plaintiffs appearing by Kenneth C. Hawkins, of Messrs. Brown and Hawkins, Yakima, Washington;

The defendant appearing by W. R. McKelvy and A. P. Curry, of Messrs. Skeel, McKelvy Henke, Evenson and Uhlmann, Seattle, Washington;

Whereupon, the following proceedings were had and done, to-wit:

A jury of twelve was empaneled and sworn to try the case.

The Court: In order that I may not overlook it later, gentlemen of the jury, I will tell you at this time that a trial of this kind proceeds according to well-established rules. The plaintiff puts on his evidence and proof first, and calls his witnesses, and they testify, and then the defendant calls his witnesses and puts on his proof, and if they have any rebuttal the plaintiffs come back in rebuttal, and then the attorneys argue, and the Court gives you his instructions on the law, and then it is submitted to you for finding such facts as are submitted for your determination.

Up to that time, until you actually retire to decide, you should not make up your minds at all, because there is always more coming, so keep an open mind at all times until the case has been finished and submitted to you. You will not be kept together in this case, since [24] it is a civil case,

but I think it is best during the short recesses, the Court usually takes a recess about eleven o'clock, and in mid-afternoon another one, and during those times I think it is best to go to the jury room, and if you want to telephone or have any errands done the bailiff will take care of that. That avoids your circulating about where witnesses may be talking about the case. During noon hour and overnight be sure not to talk to anybody about this case or permit anyone to talk to you about it. Don't discuss it among yourselves. If they start to, just tell them you are on the jury and you can't talk about it, and avoid reading accounts about it in the newspapers and listening to accounts on the radio. Avoid listening to or reading about this particular case, because we want you to get the evidence from the stand and from the court here, and not just some reporter's idea of what it was. You may proceed, gentlemen.

(Whereupon, Mr. Hawkins made an opening statement to the jury on behalf of the plaintiffs.)

Mr. McKelvy: We will reserve our statement, your Honor, until the opening of the defendant's case, if we may.

The Court: All right.

Mr. Hawkins: At this time I would like to call [25] Doctor Regan as an adverse witness.

WILLIAM S. REGAN

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. William S. Regan.

Q. Where do you live, Dr. Regan?

A. I live in Yakima.

Q. How long have you resided in Yakima, sir?

A. Approximately twenty-two years, with the exception of a few years when I went back East.

Q. And with what concern, or by what concern, are you employed?

A. California Spray-Chemical Corporation.

Q. The defendant in this case? A. Yes.

Q. And you are their entomologist, are you not, Doctor? A. Yes.

Q. And you are the chief or head of their field staff here? A. Yes.

Q. And during 1945 you were their agent and representative, were you not? A. Yes.

Q. You were employed by the California Spray-Chemical Company to assist growers in working out their spray programs? [26] A. Yes.

Q. And thereby assisting in the sale of products sold by your company?

A. You might say that.

Q. Yes; and in connection with your work in that regard you edited and published a little pamphlet or newspaper called the "Ortho News"?

A. Yes.

(Testimony of William S. Regan.)

Q. And do you have the copies that I subpoenaed?
A. The copied are there.

(Whereupon, copy of "Ortho News" Volume 17, No. 1, was marked Plaintiff's Exhibit "A" for identification.)

(Whereupon, copy of "Ortho News" Volume 17, No. 2, was marked Plaintiff's Exhibit "B" for identification.)

(Whereupon, copy of "Ortho News" Volume 17, No. 3, was marked Plaintiff's Exhibit "C" for identification.)

(Whereupon, copy of "Ortho News" Volume 17, No. 4, was marked Plaintiff's Exhibit "D" for identification.)

Direct Examination

(Continued)

Q. Dr. Regan, I am handing you Plaintiffs' Identification A. Will you state what that is?

A. Ortho News. [26]

Q. What is the date of that?

A. Volume 17, Number 1, February, 1945.

Q. And that was edited and published by you, and I should say the defendant, California Spray-Chemical Corporation?
A. Yes.

Mr. Hawkins: I will offer Exhibit A in evidence.

Mr. McKelvy: Object to the offer for the reason that it is outside the issues as framed by the pleadings.

(Testimony of William S. Regan.)

The Court: May I see it? Were you through making your objection?

Mr. McKelvy: I think so, yes.

The Court: Objection will be overruled. Admitted.

(Whereupon, Plaintiff's Exhibit A for identification was admitted in evidence.)

Direct Examination

(Continued)

Q. Referring to Plaintiffs' Identification B, will you state what that is, Doctor?

A. This is Ortho News, Volume 17, Number 2, April 17, 1945.

Q. And that was edited and published by yourself? A. That's right.

Mr. Hawkins: I will offer Plaintiffs' Exhibit B in evidence.

Mr. McKelvy: Renew the same objection made.

The Court: I assume that all of these have distinctive matter and directions about this Elgetol involved in this suit?

Mr. Hawkins: That is correct.

The Court: It will be admitted.

(Whereupon, Plaintiffs' Exhibit B for identification was admitted in evidence.)

Direct Examination

(Continued)

Q. I am handing you Plaintiffs' Identification C. Will you state what that is?

(Testimony of William S. Regan.)

A. Ortho News, Volume 17, Number 3, May 9, 1945.

Q. And that was edited and published by yourself?
A. Yes.

Mr. Hawkins: I offer Plaintiffs' Identification C in evidence.

Mr. McKelvy: Make the same objection.

The Court: Is that after the purchase of the spray material here, or before?

Mr. Hawkins: I think some of the spray material was purchased after that issue came out. The last one was dated May 9th, isn't that correct? It is my understanding that that was the case.

The Court: It will be admitted.

(Whereupon, Plaintiffs' Exhibit C for identification was admitted in evidence.)

Mr. Hawkins: I have no further questions at this time. [28]

Mr. McKelvy: I have no questions at this time, Doctor. You may step down.

(Whereupon, there being no further questions, the witness was excused.)

E. A. EMERSON

one of the plaintiffs, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, sir?

A. My name is Elda A. Emerson.

Q. And you are one of the plaintiffs in this action? A. I am.

Q. You and your wife own an orchard in Tieton? A. Yes.

Q. How large is that orchard?

A. Approximately twenty acres.

Q. What is it planted to, sir?

A. It is planted to Delicious, Winesap, and Jonathan apples, and some Bartlett pears.

Q. And some Bartlett pears? A. Yes.

Q. Do you and your wife own an orchard at or near Gromore? A. We do.

Q. And how many acres do you have there?

A. Approximately twenty acres there. [29]

Q. And what is that orchard planted to?

A. It is planted to Delicious, Winesap, and Jonathan apples.

Q. How long have you owned and operated the Tieton orchard?

A. There is a portion of that orchard that I have owned since '41, the spring of '41, and another portion in '42, about half and half; the places lie together.

Q. And how long have you owned the orchard at Gromore?

A. That was purchased in April of 1944.

Q. In April of '44? A. That's right.

The Court: What was that second name, Mr. Hawkins?

Mr. Hawkins: Gromore.

The Court: These places are both in Yakima County?

Mr. Hawkins: Both are in Yakima County. That's right, is it not, Mr. Emerson?

A. That's right.

Q. And you have operated these orchards yourself? A. Yes.

Q. Since you've owned them?

A. That's right.

Q. And what was the condition of the trees on your Tieton place in 1945, the beginning of the year?

A. The trees were fairly—in fairly good condition, thrifty, and nothing to be alarmed about that I could see in any way, except there was some mildew that was showing up, [30] especially in the Jonathans, on the place.

Q. Was the mildew condition such that it would have cut down the crop in 1945? A. No.

Q. But it might have in later years if you didn't take steps? A. It was possible.

Q. Now, what was the—what is the condition of your orchard as to production from year to year?

A. The Tieton orchard has been a fairly consistent bearing orchard. It has been fertilized, properly irrigated, cover crop, mulches, and so forth have been applied to the orchard; the trees are comparatively thrifty, and I would say that it is above average for the valley.

Q. And what would you have to say with respect to the Gromore orchard?

(Testimony of E. A. Emerson.)

A. The Gromore orchard is not located in as quite a good soil; the trees aren't quite as thrifty; there was more sign of mildew, especially on the Jonathans. It hasn't been—I haven't owned the place except since '44, and the fertilizing that I have given it hasn't as yet brought it up to the standard of the Tieton orchard.

Q. It is improving each year, is it?

A. Yes.

Q. Now, how long have you been engaged in orchard work, Mr. Emerson? [31]

A. I worked for Mr. Garretson in the summer of '35, and since that time I have been more or less—I have worked in orchards every year. I run a place for him, so to speak, operated a place for him beginning in '37, and continuing until I bought one of my own, and I've operated mine since.

Q. You have had the active management of an orchard for a period of about ten years?

A. That's right.

Q. Now, what is the normal method of controlling mildew?

A. That's a rather difficult question for me. I have never had very much trouble with mildew until I purchased this Gromore place. The remedy that I had heard of up to that time was the application of lime and sulphur.

Q. Now, did you use Elgetol "30" as a mildew control in 1945? A. Yes.

Q. And had you used any mildew control prior to the year 1945 on either of your places?

(Testimony of E. A. Emerson.)

A. Not really with the intention of trying to control the mildew. I have used some sulphur at times before, as a more or less a precautionary measure to prevent the spread or attack of mildew.

Q. Did you use any mildew spray in 1946, the spring of 1946?

A. Any mildew spray? Yes. [32]

Q. Yes. What did you use that year?

A. I used lime and sulphur.

Q. Did you have a mildew problem at the beginning of '46? A. Yes.

Q. About the same as 1945?

A. Very comparable.

Q. Well, now, in 1945 you testified you used Elgetol "30" as a mildew control. Where did you buy this Elgetol that you used for this mildew control?

A. Most of it was bought from the Yakima Farmers Supply in Yakima. There probably was a portion of it bought from F. H. Cubberly Fruit Company at Tieton.

Q. And where did you get the directions on how to apply that Elgetol?

A. That was obtained from Mr. Regan, Dr. Regan.

Q. The gentleman who was just on the witness stand? A. That's right.

Q. And when did you have your first conversation with him?

A. It must have been about the first of April, 1945.

(Testimony of E. A. Emerson.)

Q. And was that about the time you bought your first Elgetol? A. Yes, for that year.

Q. And how did the conversation take place? Were you down at his office, or what?

A. No, I was at the Yakima Farmers Supply to buy dormant spray, and I had been inquiring about the use of Elgetol [33] as a mildew spray, because I had heard that it was a control for mildew, and the operators of the Farmers Supply Company couldn't give me any recommendation on the use of Elgetol as a mildew spray, and they suggested that I call Dr. Regan and get advice from him.

Q. And you did that?

A. I did that; I called him by telephone from their office.

Q. And what did he have to say?

A. He said that Elgetol "30" was, in his opinion, the thing that was going to help this valley in the way of controlling mildew, and yet not affect the control of the coddling moth problems that we have. I told him what my problems were, and he said that Elgetol "30" was what I should use.

Q. Now, did he give you a formula, or a recipe?

A. Yes, I asked him in what strength, and about the application.

Q. What did he say?

A. He said that I should apply the first application in the pink stage of the trees, in the strength of one and a half pints per one hundred gallons of water, and then I should use a calyx spray later

(Testimony of E. A. Emerson.)

in the strength of one half pint to the one hundred gallons of water.

Q. Now, would you tell the jury what you mean by the pink stage? [34]

A. The pink stage is the stage of the trees when the bloom cluster is just trying or starting to be exposed. The bloom cluster is composed of about five blossoms, and they're in a pod, and are covered over by leaves. The leaves open up and spread away from this bloom cluster, and gradually the bloom pod or cluster will open up, exposing just the pink part of the bloom, and that was the stage that he recommended, that I was advised to spray, when those blooms—before the blooms really opened, but while the pink was yet exposed.

Q. And would you tell the jury what is meant by the calyx stage?

A. The calyx stage of apples is the stage after the bloom has shed, or the petal has dropped from the bloom; the small apple is formed immediately above the petal; there is a kind of husk, a green husk, that is on the end of the so-called apple, that protects the bloom before the bloom is opened. Those husks during the blooming stage is standing out like so, if you will pardon me for using my hands. The apple is above this, is above the bloom, and after the petals have dropped the apple starts growing, and these little husks will start closing up as the apple grows, and the calyx stage of spray is to spray during the time that the petals drop,

(Testimony of E. A. Emerson.)

before the apple grows enough for that calyx end to close up. [35]

Q. And that was the second time that you were to spray, is that right? A. Yes.

Q. At that stage; and did you follow those recommendations?

A. Just as nearly as I could.

Q. And first, with respect to the pink spray, did you spray your orchard in the pink?

A. Yes.

Q. And at what strength?

A. I used a pint and a half to the one hundred gallons of water; pint and a half of Elgetol "30".

Q. And you sprayed both orchards in the pink, is that right?

A. I sprayed the Jonathans on both orchards, yes.

Q. In the pink? A. In the pink.

Q. And what about the other varieties; did you spray them in the pink?

A. Very few trees; I might have, I did, spray a few straggling trees of other varieties, but I was principally interested in the Jonathans, because that was where I saw the most of the mildew.

Q. And what did you notice about your orchard after you had sprayed in the pink?

A. Well, I noticed that there was considerable wilting in the leaves, and also the blooms, the bloom pods, were [36] wilting, turned yellow, and brown; they just didn't look very thrifty. Some of the leaves had turned brown, and even black. Some of

(Testimony of E. A. Emerson.)

them seemed to loosen up, or just stop growing, and the blooms were the same way. The bloom pods showed about the same results, and there was a number of the blooms that didn't open. There was considerable burn or——

Q. Did you contact Dr. Regan after you saw that condition? A. Yes.

Q. And where did you see him?

A. I saw him first at his office.

Q. And what was said there?

A. I told him that I thought that I had quite a little damage from the spray that I applied. This was done, this conversation took place, before I had finished all the pink spray, we were still applying that spray, and he said that he didn't think that I needed to worry about it, but he would come out and see; made an appointment to come to my place and look the situation over, but——

Q. Did he—excuse me, go ahead.

A. ——but he didn't think there would be any need for alarm, and he would advise me to go ahead and finish the application before the trees would get in bloom, because it would be too late to spray at that stage.

Q. Did he come out to your orchards? [37]

A. Yes, he did, after we had finished the spraying, that pink spray. The pink spray I believe required about five or six days to apply, and Dr. Regan did come out immediately after we had finished the pink spray.

(Testimony of E. A. Emerson.)

The Court: The Court will recess for five minutes.

(Short recess.)

(All parties present as before.)

Direct Examination of Mr. E. A. Emerson
(Continued)

Q. I believe you stated that Dr. Regan came out to your orchards directly after the pink spray in 1945. Did he visit both of your orchards?

A. Yes, he did.

Q. In your company? You were with him?

A. Yes; he came first to the Tieton place, where I live.

Q. You looked over the whole orchard, the two of you?

A. Not over the whole orchard, no; we just walked down through a portion of it.

Q. And what did he have to say?

A. On the Tieton place he said that he couldn't see very much to be alarmed about, that in his opinion it was having the desired results.

Q. How did he explain the burn?

A. He said that the Elgetol attacks the mildew similar to a cancer cure attacking a cancer; that it starts eating the mildew, and any portion of the tree or leaves that [38] is affected by mildew will be attacked by the Elgetol, and if the mildew runs into the leaves it naturally will affect those leaves.

Q. That was his explanation? A. Yes.

(Testimony of E. A. Emerson.)

Q. And did he say anything while he was on the Tieton place about using the Elgetol again on the calyx, the second spray?

A. I don't recall if that was mentioned that time or not.

Q. Then you went down to the Gromore place?

A. Yes, the next day.

Q. The next day; and what did Dr. Regan have to say there?

A. He seemed a little surprised that the trees showed as much burn as they did, and made the statement that he thought it was more damage than he had noticed in any orchard up to that time, but that the Elgetol in his opinion had attacked the mildew that was on the trees at the time of its application, and there would be no more danger from any further burn by another application, because the mildew was, in his opinion, taken care of on the exposed parts at the time that the first application was made.

Q. What did he have to say about using Elgetol again in the second spray, in the calyx spray?

A. Well, he said that I should come back with the calyx spray [33] of Elgetol, and therefor catch the new mildew that might show up in the terminal growth of the trees, after the first application.

Q. And did he give you a formula to use at that time?

A. Well, he still recommended the half pint to the one hundred gallons of water.

(Testimony of E. A. Emerson.)

Q. And were you concerned about using the Elgetol on the second spray?

A. Yes, I was; more so after I talked with a number of farmers and various people that had noted the burns.

Mr. McKelvy: Not what somebody else said; pardon the interruption.

The Court: Yes, I'll sustain the objection. Don't say what they told you.

Direct Examination

(Continued)

Q. At any rate, you talked to Dr. Regan again, is that right?

A. Yes; before I put on the calyx spray I did go back and talked with him, and asked him——

Q. Here's the idea. You can repeat what Dr. Regan told you, because he's in effect one of the people involved in this action, but you can't say what someone else, a stranger, had to say, a stranger to this action; so go ahead and say what Dr. Regan told you; that's perfectly admissible.

A. Dr. Regan seemed a little concerned that I was questioning him for the second time about making this calyx [40] application, I thought, and I thought probably it might appear rude myself.

Q. It might appear what? A. Rude.

Q. Rude?

A. Yes, because he said that this Elgetol had been used, he said, "We've Elgetol in the east for six or seven years, and we've used it in the lower

(Testimony of E. A. Emerson.)

valley, and in the Wenatchee Valley, and we wouldn't recommend it if there was any likelihood of damage."

Q. And you then applied the calyx spray, using the Elgetol?

A. Yes, after he told me at that same time that I would be safe to use Elgetol in the strength of up to a pint to the hundred gallons, and I told him that I didn't want to use more than his minimum recommendations of a half pint to the hundred, and that's what I used, a half pint.

Q. Did you spray the other varieties besides the Jonathon?

A. Yes; I also consulted him about Two-Spot Mite that was showing up in especially the Wine-sap, and asked his advice about applying the Elgetol to them, and he said that in his opinion the Elgetol would control the Two-Spot Mite, and he would recommend spraying the whole orchard in the calyx with Elgetol.

Q. And you did that? [41] A. Yes.

Q. The Tieton, as well as the Gromore?

A. Yes, as near as I could. The calyx had closed on a lot of the trees and apples before we completed that spray, but we did start in that spray.

Q. And what happened to your orchard after this Elgetol was sprayed the second time?

A. Well, there was very similar results as was noted in the first spray. A number of the leaves seemed to be burned, wilted, and the apples really stopped growing, I guess. However, that wasn't

(Testimony of E. A. Emerson.)

noticeable for a few days after the application, the growth of the apples, but they didn't seem to have developed any more after the second application, and they turned yellow, the stems turned yellow, and they were very loose on the tree; they were not going to stick.

Q. And did you attempt to contact Dr. Regan again after that time?

A. Yes, I did contact him, but not until after we had started our first cover spray, probably ten days or two weeks after the calyx spray was started, and I did talk with him at his office, and told him that in my opinion the orchard was pretty well ruined, the crop was.

Q. Pretty well what?

A. Ruined, and that when we were applying this first cover [42] spray, the first spray after the calyx had been applied, the pressure from the spray going through the trees was knocking off those apples that were burned or that were loose, and a great lot of those apples were falling off, and I didn't think that there would be enough left on the trees to pay to spray the orchard for the rest of the season. I asked him if he had any recommendation for a material that I could use to take off the rest of the crop so that I could stop the expense of spraying for the rest of the season. He said he had no recommendation except just by picking them off by hand, and we both agreed that that was practically impossible.

Q. In any of your conversations with Dr. Regan

(Testimony of E. A. Emerson.)

did he have anything to say as to whether or not you would have a crop?

A. Yes, he did. At the time that he came to the Gromore place, between the two Elgetol sprays, he made the statement that we always think we're hurt worse than we are, and in his opinion I still had a good crop of apples, but I'd probably saved myself some thinning money by applying this spray.

Q. What was the condition of your orchard in the spring of 1945 as to bloom? Did you have a good bloom that year?

A. Yes, I had a good bud, the prospects were very satisfactory insofar as the prospect for a crop, but the bloom itself, [43] a lot of the blooms didn't open up after the first application was made, and it looked that the crop might not be as heavy as it had before the first application was Elgetol.

Q. Based on your experience in running orchards, and based on what you saw there in the spring of '45, before the first application of Elgetol, what was your opinion as to the character of crop you would have had that year?

Mr. McKelvy: I object to that as speculative and objectionable, calling for an answer that does not lend itself to opinion testimony, and would be speculative.

The Court: Will you read the question, please?

(Whereupon, the reporter read the last previous question.)

(Testimony of E. A. Emerson.)

The Court: I will overrule the objection.

Direct Examination

(Continued)

Q. You may answer.

A. My opinion of the prospect for crop would have been a good average production for the average orchard in this county, which would probably be estimated at up to a thousand boxes per acre, loose boxes.

Q. You have prepared some figures with reference to the Tieton orchard, have you not, Mr. Emerson?

A. Production figures?

Q. Yes. [44] A. Yes, I have.

Q. Going back over the years that you have been on the place?

A. Yes, just for that time.

Q. Now, then, in 1945, what was your actual crop of Jonathans on your Tieton place, in tons?

A. Those figures I don't remember.

Q. Do you have them here, Mr. Emerson?

A. Yes, they are, I believe, in that——

Q. Would you come down and get them, please?

A. I don't recall the question.

Q. The question was the number of tons of Jonathans produced in 1945 on your Tieton place.

A. Thirty-nine ton in '45, of Jonathans.

Q. And how many tons of 'Saps were produced in '45?

A. Forty-six.

Q. Forty-six tons? A. Yes.

Q. And in 1944, how many tons were produced on your Jonathan place, of Jonathans?

(Testimony of E. A. Emerson.)

A. Fifty-eight and a half, approximately.

Q. And how many tons of Winesaps?

A. Fifty-nine.

Q. And in 1943, on your Tieton place, how many tons of Jonathans? [45]

A. Fifty-four.

Q. And how many tons of 'Saps?

The Court: Fifty-four Jonathans, is that?

A. Yes.

Mr. McKelvy: Excuse me, I didn't get the answer there on the Winesaps.

A. And sixty-four of Winesaps.

Q. And in 1946, how many tons of Jonathans?

A. Sixty-six.

Q. And how many of 'Saps?

A. Seventy-nine.

Q. And excluding the year '45, what was your average production over those three years, of Jonathans, on your Tieton place?

A. The average? Well, I think I have that figured somewhere. That's from '43 through '46, excluding '45. I don't recall just what that is, on the average. That's right, that's what we figured the average over those three years was, fifty-nine and a half tons.

Q. Of Jonathans? A. Of Jonathans.

Q. On your Tieton place. And what was the average on your Tieton place of Winesaps?

A. Sixty-seven and one-third.

Q. Tons? [46] A. Tons.

(Testimony of E. A. Emerson.)

Q. And based on that average, and based on the orchard as you saw it in the spring of '45, would you have expected that tonnage in '45?

A. Yes.

Q. Now, then, I believe you testified that your actual Jonathan crop on your Tieton place was thirty-nine tons in 1945? A. That's right.

Q. And your estimate of what it would have been except for the Elgetol was fifty-nine and a half tons? A. That's right.

Q. Or a loss of twenty and a half tons of Jonathans on your Tieton place? A. Yes.

Q. And then on your Winesaps I believe you testified that your estimated crop in '45, except for Elgetol, was sixty-seven and one-third tons?

A. That's right.

Q. And your actual production was forty-six tons, in '45? A. Yes.

Q. Leaving a difference or loss of twenty-one and one-third tons of Winesaps, is that right?

A. That is right.

Q. Now, then, going over to your Gromore place, what was [47] your actual production of Red Delicious in 1945? A. By tons, thirteen.

Q. And in 1944 what was your Red Delicious tonnage? A. Twenty-eight and one-third.

Q. And in 1946 what was your Red Delicious tonnage? A. Thirty-eight tons.

Q. And with reference to the Jonathans on your

(Testimony of E. A. Emerson.)

Gromore place, your actual '45 production was how much? A. It was eighteen tons.

Q. And in 1944 what was your tonnage on Jonathans?

A. One hundred twenty-six and a fraction tons.

Q. One hundred twenty-six. And what was your production in 1946?

A. One hundred eighty-four tons.

Q. Now, going to the Winesaps, your production in 1945 in actual tonnage was what?

A. Sixty-two tons.

Q. And in 1944, what was your tonnage?

A. Eighty-eight and four-tenths.

Q. And in 1946 what was your tonnage?

A. One hundred forty-two.

Q. Now, then, your average yearly production since you have been on the orchard, excluding 1945, on your Gromore ranch, for Red Delicious, was how many tons? A. The average excluding 1945?

Q. Yes. A. Was thirty-three tons.

Mr. McKelvy: Pardon me—is that the average of 1944 and 1946?

Q. Yes. A. That's right.

Q. And your Winesaps on the Gromore orchard?

A. The average was one hundred fifteen tons.

Q. And your Jonathans?

A. One hundred fifty-five tons.

Q. Now, I believe that you testified that your actual production on the Gromore place of Red Delicious in '45 was thirteen tons, is that right?

A. Of Red Delicious? Yes.

(Testimony of E. A. Emerson.)

Q. And your estimated crop production in '45 of Red Delicious was thirty-three tons?

A. That's right.

Q. The difference would be twenty tons. That would be your loss except for the Elgetol—twenty tons?

A. Yes.

Q. And with reference to your Winesaps, I believe you testified that your actual production in 1945 was sixty-two tons, is that right?

A. That's on Gromore; yes, that's right.

Q. And your estimated production was one hundred fifteen tons? [49]

A. That's right.

Q. Or a loss of fifty-three tons?

A. That's right.

Q. And on your Jonathans you testified the actual production was eighteen tons, is that right?

A. That is correct.

Q. And your estimated production was one hundred fifty-five tons, is that right?

A. Yes.

Q. Or a loss of one hundred thirty-seven tons?

A. That's right.

Q. Now, then, referring to your Gromore place, what was the average price that you obtained on your Jonathans in 1945, of the crop that you did produce?

A. On which place?

Q. On the Gromore place.

A. For the Jonathans I got one hundred dollars a ton.

Q. And that included all grades?

(Testimony of E. A. Emerson.)

A. That was orchard run, just as they were picked.

Q. And what was your price on Red Delicious?

A. Orchard run was one hundred six dollars. I did not sell the Red Delicious orchard run; they were sold on a pack-out basis, and the price that I received was one hundred seventeen dollars and fifty cents with the culls out, but there was enough culls in there that brought the average [50] for the entire crop down to one hundred six dollars.

Q. One hundred six dollars? A. Yes.

Q. And on your Winesaps, what was your average price per ton there?

A. Orchard run would have been, or was, one hundred fifteen dollars and fifty cents. They were sold on the same basis as the Red Delicious; they were packed.

Q. And your price for your number ones was higher than one hundred fifteen dollars?

A. I didn't get the question.

Q. And your price for the number one 'Saps was higher than one hundred fifteen dollars?

A. Yes, it was one hundred seventeen dollars and fifty cents.

Q. And your cullage brought the average price down to one hundred fifteen dollars and fifty cents per ton? A. Yes.

Q. Now, with reference to the Tieton orchard, what was your average price in 1945, per ton, on your Jonathan apples?

A. Let's see—well, I think I have that some

(Testimony of E. A. Emerson.)

place. I'll have to refer to my book. They were sold—the Tieton crop was all sold on the same basis, at one hundred seventeen dollars and fifty cents, culls out, and there was a few culls in the Tieton place.

The Court: You're talking about the Jonathans, [51] Mr. Emerson?

A. Yes; all varieties were sold on the same basis, there.

The Court: All varieties?

A. Let's see; on Jonathans the average for orchard run fruit was one hundred thirteen dollars and twenty-five cents.

Q. And what was the average on your Winesaps?

A. It was one hundred sixteen dollars and seventy-five cents.

Q. That's on your Tieton?

A. That's on the Tieton place, yes.

Q. In 1945. Have you attempted to run those figures across, on your sheets there? With reference to your Tieton place you testified you had a loss of Jonathans of twenty and one-half tons.

A. Yes, I have that.

Q. And you testified that the apples that you did sell from that place, orchard run, was one hundred thirteen dollars and twenty-five cents a ton?

A. That is right.

Q. And that would make the loss in figures how much?

A. Well, let's see; it would be two thousand

(Testimony of E. A. Emerson.)

three hundred twenty-one dollars and sixty-three cents, on the Jonathans at the Tieton.

The Court: Will you read that figure again, please?

A. Two thousand three hundred twenty-one dollars and sixty-three cents. [52]

Q. And on your Winesaps?

A. There was, I consider, a twenty-one and a half ton loss at one hundred sixteen dollars and seventy-five cents per ton, would amount to two thousand four hundred ninety dollars and twenty-seven cents.

Q. Now, then, on your Gromore ranch you testified a Red Delicious loss of twenty tons at one hundred six dollars a ton, is that right?

A. Yes.

Q. And that would come to what?

A. That would come to two thousand one hundred twenty dollars.

Q. And with respect to your Winesaps?

A. The Winesaps estimated loss would be fifty-three tons at one hundred fifteen dollars and fifty cents; that amounted to six thousand one hundred twenty-one dollars and fifty cents.

Q. And your Jonathans on your Gromore ranch?

A. Jonathans was a loss of one hundred thirty-seven tons, at one hundred dollars per ton, would be thirteen thousand seven hundred dollars.

Q. Now, these prices that you have given are the fair market values of those crops at maturity?

A.: Well, so far as I know, I could have sold

(Testimony of E. A. Emerson.)

more fruit if I had had it, at those same figures; in fact, I could [53] have sold the Jonathan crop at the same figures that I did the other varieties had I had a full crop, but they were very few apples on the tree, and they were not a very good quality of apple; they were coarser grain, larger, and actually were more culls among them, a higher percentage of culls, than there are on trees that are heavier loaded, and I would have been able to raise that on the Jonathans at Gromore.

Mr. Hawkins: You may cross-examine.

Cross-Examination

By Mr. McKelvy:

Q. Well, Mr. Emerson, the price of the apples wasn't the profit that you made, was it? It costs something to raise and market these apples, didn't it? A. Yes.

Q. Well, have you any way that you can tell us what the net profit, if any, was on your apples? In other words, you go out and sell a ton of apples, we'll say, in one case, at one hundred fifteen dollars and twenty-five cents. How much of that was profit if any, in that year?

A. Well, that depends on your over-all expense of growing a crop, sure.

Q. Well, what are the expenses? Tell us the expenses of operating to get a ton of apples.

A. I don't believe that you can set a figure as to how much it costs you to grow a ton of apples. You could come [54] nearer telling how much it takes

(Testimony of E. A. Emerson.)

to operate an acre, or a certain number of trees, because you have a certain amount of work to do whether you have any apples on the place at all or not. You might have a big crop one year, and on the same place the next year it might be very light, and you would have your labor and your expenses would be comparable. Naturally, it costs more to grow a big crop.

Q. Pardon me?

A. But you couldn't, or I have never been able to figure out how much it costs to grow a ton of apples. Too many things enter into the picture.

Q. Well, did you figure that you made any net profit in 1945? A. On my whole place, yes.

Q. Couldn't you figure from that on the number of tons of apples about how much profit, if any, you would make on a ton of apples?

A. Well, I haven't.

Q. Well, you have to figure it some way when you make an income tax return to Uncle Sam, I take it.

A. Yes, that's right; I know what my expenses on the entire place was for that year.

Q. Which place?

A. On both places: I know what the entire cost of producing [55] that crop was.

Q. What was it, the entire cost?

A. I probably don't have them in this book. They're in some of the papers that we have here, but I don't happen to have it here.

Q. I see.

(Testimony of E. A. Emerson.)

Mr. Hawkins: I thought it was in that book.

A. I don't think so. Yes; that's right. Would you want this broke down?

Q. If you have it there so you can give it to us, yes.

A. I spent in the year of 1945 for labor, fourteen thousand four hundred fifty nine dollars and twenty two cents. For seed and plants, which consists principally of cover crop seeds, seventy five dollars; supplies, three thousand three hundred ninety one dollars and twelve cents; repair and maintenance, two thousand five hundred forty one dollars and ninety three cents; fertilizers, eight hundred twenty one dollars and seventy five cents; gas and oil, nine hundred forty nine dollars and thirty eight cents; taxes, three hundred two dollars and twenty five cents; insurance, eight hundred eleven dollars and sixty eight cents; interest, three hundred ninety two dollars and fifty cents; water, electricity and telephone, three hundred ninety eight dollars and eighty cents; automobile up-keep, three hundred fifty dollars; travel expenses, [56] four hundred dollars; which makes a total of a little over twenty four thousand dollars.

Mr. Hawkins: You have one other item, don't you?

The Court: Is that both your orchards, or just one of them?

A. Yes, that's both orchards; they're not segregated as to places.

(Testimony of E. A. Emerson.)

Mr. Hawkins: You have one other item there, do you not, depreciation on your buildings?

A. Yes, that was the actual cost of production. Depreciation on farm buildings and farm equipment, one thousand two hundred forty dollars.

Mr. Hawkins: What does that make the total, then?

A. That totals—I'll have to total that. Twenty five thousand ninety eight dollars and sixty three cents.

Q. Now, Mr. Emerson, it didn't cost anything—well, put it this way; you had no cost of operation so far as a tree is concerned that didn't bear any apples; I mean after your last spray—I suppose that's obvious?

A. You say that I didn't have any cost?

Q. Yes, is that right? Suppose you spray in May, and you see it isn't going to bear any crop. You have no further expense of operation?

A. No, I didn't have any trees that I didn't cultivate right on through the season, just as though they had a crop, [57] because they all had a few apples, and you couldn't segregate.

Q. None of the trees absolutely were barren, then? A. No, every tree had an apple.

Q. And naturally, I suppose it would cost more to harvest a big crop than a small one?

A. Yes, it costs some more; however, it costs more per ton, or more per box, to gather a light crop.

Q. Are you able to give us any idea of what

(Testimony of E. A. Emerson.)

profit, if any, there was that year in a ton of apples, we'll say, so far as your places are concerned?

A. Off-hand I couldn't. I could figure that and get it for you. This expense record is for the entire crop, including some pears, the growing of some pears, and I had some income from them.

Q. Did you put the Elgetol on pears?

A. They were sprayed with Elgetol; however, not exactly the same stage as the apples.

Q. What were they, D'Anjous, or Bartletts?

A. They were Bartletts.

Q. How many Elgetol sprays did you put on the pears? A. One.

Q. When?

A. Well, it was the last part of the calyx spray in the apples. [58]

Q. Now, in these conversations you had with Dr. Regan, as I understand it, and I want to be sure that I am correct on it, you say you talked to Dr. Regan before or after you put the pink on?

A. I talked with him by telephone before.

Q. By telephone before? A. Yes.

Q. How long before you applied the pink?

A. I talked with him on or about the first of April.

Q. By telephone?

A. By telephone, and the pink spray was applied, I started the pink spray on the 26th of April, I believe, the 25th or 26th; it would be about three weeks.

(Testimony of E. A. Emerson.)

Q. Were you acquainted with Dr. Regan before that time?

A. I had just seen him; I possibly, I probably, had spoke to him, but I wasn't personally acquainted with him.

Q. You had never discussed any spraying or fruit growing problem with Dr. Regan before this telephone conversation? A. No, I hadn't.

Q. How long had you been operating these orchards you mentioned?

A. I have operated them from the time that I bought them.

Q. When was that?

A. That was in—a portion of the orchard, the Tieton orchard, was bought in '41 or '42, and the Gromore [59] orchard in '44.

Q. Did you and Dr. Regan talk about the advisability of using Elgetol as a chemical thinner?

A. I wasn't interested in chemical thinning.

Q. Did you talk with Dr. Regan about that at any time?

A. I didn't talk with him about it. It might have been mentioned in our conversations, probably was, it probably was mentioned, but as to the details of the conversation, I don't recall, because I wasn't interested in thinning.

Q. Well, as a matter of fact, thinning by hand became something of a problem during the war and the shortage of help, didn't it?

A. It's always a problem.

(Testimony of E. A. Emerson.)

Q. It's always a problem, yes, and it was hard to get help during the war, is that right?

A. Yes.

Q. And when you first heard of Elgetol, didn't you hear that it had been used in the east as a chemical thinner?

A. As to where, I wouldn't know, but I had heard it had been used as a chemical thinner, and had heard it had been used as a dormant spray.

Q. And had you heard that it had checked mildews when being used as a chemical thinner?

A. I supposed that was the way.

Q. Yes, at that time you supposed that was the way? [60]

A. Yes.

Q. Now, you first heard of Elgetol about when?

A. Well, I heard of it some time during the year of '44.

Q. And you used it in '44?

A. Yes, I used some in 1944.

Q. Did you talk with Dr. Regan or any other representative of the California Spray in 1944, about the use of Elgetol?

A. No, I didn't.

Q. What did you use the product for in 1944?

A. I used it primarily for the control of mildew.

Q. And when did you apply it in 1944?

A. That was applied some time during the month of June.

Q. On what varieties?

A. It was applied on Jonathans, Winesaps, and Delicious.

Q. Now, you say some time in the month of

(Testimony of E. A. Emerson.)

June. What state or stage of the tree, or was the tree, at that time?

A. The fruit had set on the tree and was probably an inch to an inch and a half in diameter, apples would be.

Q. And where did you get your directions, or did you just take them from your own experience, as to how you would use it in 1944?

A. Well, I had had no experience with Elgetol up to that date. The instructions that I had on that came to me in a rather round-about way. This material was bought that year from F. H. Cubberly Fruit Company. [61]

Q. That was in 1944? A. In '44.

Q. Yes.

A. And they had recommendations there that was handed to them by someone from the California Spray Company, that was distributing the Elgetol here.

Q. Well, now, may I ask this: Did you, when you applied it in 1944, have in mind mildew entirely?

A. Yes, that was the only reason that I applied it. I had mildew on the tree, and at one of the spray applications, the cover spray we were applying, I mixed a few pints of the Elgetol "30" with the lead spray, and I sprayed several trees with it.

Q. About how many trees did you spray in 1944?

A. Well, that's a general question; I sprayed all that I had on Tieton, or on the Gromore place, before I had finished, but I didn't do that all at

(Testimony of E. A. Emerson.)

one application. I sprayed a few tanks of it on one of the covers, and considered the results, and then I was well enough satisfied with the result that I saw that I used it on the remainder of the orchard in the next application, which was probably two weeks later, ten days or two weeks later.

Q. That is, you were satisfied that it was checking mildew on the trees? [62]

A. Well, I thought it was.

Q. Yes, enough so that you went ahead and used it some more in 1944? A. That's right.

Q. Would it be safe to say that you sprayed as many as 500 trees?

A. I sprayed more than 500.

Q. More than 500. Would you be able to give us any idea of how many trees, or not?

A. Probably a thousand trees.

Q. And did you get good results, so far as checking mildew was concerned, in 1944?

A. The end results wasn't good. Immediately, within a few days, after the application, it appears to be controlling your mildew, or clearing the mildew from the leaves.

Q. Yes; that was in 1944?

A. That's right.

Q. All right; what actually happened in 1944?

A. Well, I got a little burn on some of the leaves; the fruit was not affected by burn, and I don't think that there was an appreciable amount of injury to the foliage on the trees; there was some.

(Testimony of E. A. Emerson.)

Q. There was some injury to the foliage?

A. Yes.

Q. You knew that Elgetol was so-called Dinitro, "DN" did you? [63]

A. Well, that doesn't mean a lot to me.

Q. I see; how long have you worked in sprays?

A. I've worked in spray since '36, '37.

Q. Well, after you got through using Elgetol in 1944, were you satisfied with it? Did you think you has got some good out of it in 1944, or not?

A. Well, I didn't think that I got the results that I needed.

Q. Do you know when and where you first heard of Elgetol? A. I heard of it in 1944.

Q. And where, and from whom, or what source, do you know?

A. I couldn't say the first one that I heard talking of it. I've heard just general.

Q. You didn't hear it from anybody representing California Spray Company, did you?

A. No, not directly.

Q. Matter of fact, it was kind of community talk that this Elgetol was a new product that might be all right, isn't that right?

A. Not exactly.

Q. Well, you say "not exactly". There was considerable community talk about Elgetol, its possibilities? A. Yes.

Q. And you heard that community talk about the possibilities of Elgetol? [64]

A. That's right.

(Testimony of E. A. Emerson.)

Q. You knew Elgetol had not been used here in the Yakima Valley prior to that time?

A. No, I didn't know that.

Q. Well, did you think it had been used? Did you know anyone that had used it?

A. No, I didn't know anyone that had used it, but I didn't know how long it had been used, where it was manufactured, or where it had been used.

Q. I assume you read that horticultural report, that magazine that comes out every year after the annual horticultural meeting?

A. No, I do not always read it.

The Court: This is a good time to recess. We will recess until 1:30, and remember, members of the jury, what I told you about not discussing this case among yourselves or with anyone else during the recess.

(Whereupon, a recess was taken until 1:30 o'clock p.m.)

Yakima, Washington,

January 27, 1947,

1:30 o'clock p. m.

(All parties present as before, and the trial was resumed.)

Cross Examination of E. A. Emerson

(Continued)

Q. Mr. Emerson, I'm not sure you answered just before the [65] recess as to whether you read

(Testimony of E. A. Emerson.)

the booklet put out, called the Proceedings of the Washington State Horticultural Association?

A. I am sure I did not read it accurately; I probably glanced at a part of it.

Q. And the one put out covering the meeting of December, 1944?

A. No, I don't think I read that; I did not read that.

Q. Do you get the copy of the publication?

A. I have gotten one in previous years.

Q. Yes. Did you know that there was some discussion about the use of Elgetol at this 40th annual meeting, held December 4, 5, and 6, 1944, Yakima Horticultural Association? A. No.

Q. You did not know there was?

A. No.

Q. Now, as I understand it, Mr. Emerson, you say that you never did use Elgetol "30" for the purpose of commercial thinning?

A. That's right.

Q. When you used it first, for the use of mildew, in 1944, did you know of any other growers that had used Elgetol for the purpose of controlling mildew?

A. No, not to have the definite knowledge, no.

Q. But you had heard what you called a community rumor, is that right?

A. That is right.

Q. What had you heard in that connection?

A. Well, I had heard that this spray had been used in the valley, or various places, and seemed to

(Testimony of E. A. Emerson.)

be giving good results in the control of mildew, also as a commercial thinner, and I believe that's about all that I heard.

Q. And you had heard that before the time that you used it in 1944? A. Yes.

Q. You had heard that Elgetol "30" had been used for thinning in orchards that were infested with mildew, that they had got practically one hundred per cent control on the mildew by its application in thinning?

A. Yes, I had heard that rumor.

Q. And that's why you used Elgetol "30" is that right?

A. That's one of the reasons.

Q. What are the other reasons?

A. I talked with Cubberley's man, his office man, as to whether he had any knowledge of the use of Elgetol in the control of mildew, and he said that he did not know of it personally, but it was——

Q. May I interrupt you there?

Mr. Hawkins: Just a moment; let the witness answer the question. You're asking for the other reason, and he's giving it to you.

Q. Well, I just want to ask you when it was got this information.

A. That was at the time, or about the time, that I was buying Elgetol in 1944.

Q. Excuse me for interrupting; I just wanted to get the time.

A. Well, the only thing that I was about to say, this office man of Cubberley's told me that this

(Testimony of E. A. Emerson.)

spray, which was Elgetol "30" was recommended for or had been found to be effective in the control of mildew.

Q. Now, you were running these two places you told us about, the Tieton and the Gromore place, in 1943, were you?

A. Not the Gromore place.

Q. You bought it in what year?

A. In '44.

Q. Do you know about its production in '43?

A. Not personally; I know what the owner told me that its average production was, or had been in previous years, but not to my knowledge.

Q. We'll go to the other one, then, that you do know about, the Tieton ranch. What was its production in '43?

A. Do you want them by varieties?

Q. Yes, please, and if it will help any, I'm going to ask [68] you about '42; you can cover them both at the same time.

A. I don't have the production for '42.

Q. I see; then give us '43.

A. In '43 the Jonathan production in '43 was fifty four tons. The Winesaps were sixty four tons.

Q. Did you have any Delicious on that farm?

A. Yes, we had Delicious; however, they're not entered into this case, and I don't have them segregated. I can find that, I believe.

Q. All right, let it go, as long as they're not involved here. Now, during the season of 1944, over what period of time did you apply Elgetol "30"?

(Testimony of E. A. Emerson.)

A. It was during the month of June; some of it was applied probably about the middle of June. Those are approximate dates.

Q. It was during the month of June, was it?

A. It could have extended over into July.

Q. And you got what you considered were satisfactory results by the use of Elgetol "30" in 1944?

A. No, I wouldn't say that they were satisfactory. I did say that there seemed to be some control.

Q. Some mildew control?

A. Some mildew control; there was also some burn, but I wasn't alarmed about it. I couldn't see that there was enough injury to be alarmed about. [69]

Q. Was there some burn of the foliage in 1944?

A. There was some burn of the foliage in 1944.

Q. Well, put it this way. By reason of your experience with it in '44, you want to use it in '45, didn't you?

A. That isn't the reason.

Q. That isn't the reason? Were your Jonathans bothered with mildew quite a bit?

A. There was more or less mildew throughout the Jonathans.

Q. Matter of fact, the season of '45 was a very bad year for mildew, wasn't it, in the Yakima valley?

A. I am not acquainted too much with conditions throughout the valley.

Q. How about your two places there?

A. On the Tieton place the mildew wasn't bad,

(Testimony of E. A. Emerson.)

never has been, but there was some mildew that can be seen, almost any year you can see some sign of mildew. The Gromore place had more mildew.

Q. Worse on Jonathans, ordinarily?

A. It was worse in Jonathans than in other varieties that I have.

Q. Mildew on some occasions, if not checked, will cut down a crop, won't it?

A. I suppose it would.

Q. Well, why do you want to get rid of mildew? Why do you fight it? What's wrong with having mildew? [70]

A. Mildew not only affects the crop that might happen to be on the tree; it affects the growth of the tree, the terminal growth. It also affects the fruit itself, by marking it up, making it a low grade of fruit.

Q. Does it affect the production the following year; let's say if you have mildew bad one season, does it ordinarily cut your crop the next year?

A. Not necessarily.

Q. If it affects the terminal growth it does, I take it?

A. Not necessarily.

Q. What is the terminal growth?

A. The terminal growth is the growth on the end of any limb.

Q. What is the importance of terminal growth, if any?

A. Your tree must have terminal growth if it continues to grow, get larger, spread.

(Testimony of E. A. Emerson.)

Q. It must have terminal growth if it is going to have a crop next year, too, I take it?

A. That isn't necessarily true. The fruit buds will bear for several years after they come on the tree, and those fruit buds would not necessarily be affected by the mildew, but to keep that consistently bearing you must not allow the terminal growth to stop for any appreciable number of years, or it would probably affect the production of those trees in later years.

Q. In other words, if you let mildew grow, it would check [71] the production of that tree in the following year or years, without fighting it at all.

A. In the following years, but not in the following year. I wouldn't say it would affect the growth or production in the following year.

Q. Well, if you have a tree that is affected with mildew, and you don't do anything about it, you usually get pretty bad crop, marked fruit, and shortage of the crop?

A. Well, in extreme cases, yes.

Q. Well, some worse than others, I take it?

A. Sure.

Q. Had you ever sprayed this orchard since you had it, for the mildew, with anything other than Elgetol?

A. I've sprayed with a lime-sulphur in previous years.

Q. And that was to check mildew?

A. It had been applied as a dormant spray, hoping that it would help to control mildew.

(Testimony of E. A. Emerson.)

Q. As I understand it, lime-sulphur is pretty much the old standard treatment of mildew, is that right? A. As I understand it.

Q. Yes. What is wrong with using lime and sulphur to check mildew? Why were you interested in Elgetol or something else besides lime and sulphur?

A. I had codling moth problem, controlling codling moth in these same orchards that there was mildew showing up, and [72] the best recommendations for the control of codling moth is to use a poison spray, such as lead, or priacide, combined with oil, for the purpose of destroying the egg deposit. It is more effective if you use oil, and by using lime and sulphur they tell me that there is danger of getting a burn or damage or injury to the fruit, if the oil is applied too soon after the lime and sulphur.

Q. Well, see if I understand it, now. You mean if you use lime and sulphur you can't follow it up with your oil summer sprays soon enough, is that what you mean? A. That's what I mean.

Q. Without getting damage. If you waited long enough, following lime and sulphur, the season would be over, the crop would be on the tree, is that it?

A. In some cases. There is a difference in the recommendation of the time that should elapse between the lime-sulphur sprays and oil. Some recommend thirty days, which wouldn't be too long. Some recommend even longer, and I'd rather not

(Testimony of E. A. Emerson.)

take the chances of applying the oil if there is danger of burning it.

Q. You do get damage sometimes from lime-sulphur sprays, don't you, Mr. Emerson?

A. Well, I have heard that such things do occur.

Q. And they've used lime-sulphur for a good many years, I believe. Do you have any idea how long they've used it? [73]

A. How long I have used it?

A. No, just generally?

A. No, I have no idea.

Q. It was used when you first got into the orchard business, anyway? A. That's right.

Q. What kind of weather did you have in 1945, about the time you made this second application of Elgetol? A. That I don't remember.

Q. Well, wasn't it a rather cold and wet spring following the application of the calyx spray? You don't have any recollection at all?

A. Well, I know we do have cold periods during about all our spring.

Q. All of your springs—you mean you have cold springs here, or did I misunderstand you?

A. We do have cold springs. We have some nights that are very near down to the freezing point during the spring season.

Q. How about the rain? Was it a rainy season?

A. There was some rain.

Q. And how about the rain right after the application of this calyx spray in 1945?

(Testimony of E. A. Emerson.)

A. That would be hard to say, because we were probably applying that calyx spray for a period of ten days or [74] two weeks from the time we started until it was completed. We probably had any kind of weather during that period.

Q. That was in '45 you were applying that calyx spray for two weeks? A. That's right.

Q. Could you compare the season of '45 with the '44 season?

A. They were similar. The '45 season would probably be wetter in the spring.

Q. Does weather have anything to do with possible or probable damage from the use of sprays?

A. With some sprays I understand that it does have.

Q. For instance, if you use the old stand-by, lime and sulphur, what kind of weather do you prefer to follow your application of that kind of spray?

A. Well, I haven't used it enough to really be able to answer that intelligently. It shouldn't be too hot, I believe.

Q. If it is too hot what happens?

A. You might get burned.

Q. And if you use an oil spray, isn't there danger if it's warm weather and then turns cold and draws the oil into the tree?

A. For some types of oil that is true.

Q. Weather is a factor in connection with the use of spray, isn't it, generally speaking? [75]

(Testimony of E. A. Emerson.)

A. With some sprays it probably is. I'm not familiar with those things; those are all hearsay.

Q. Mr. Emerson, you knew that the use of Elgetol, or Elgetol "30" or "20" was in a—well, it was in an early stage, so far as being used here in the valley was concerned, didn't you, when you used it in 1944 and '45?

A. I knew it was new insofar as I was concerned.

Q. Yes. And didn't you know that it was new so far as the growers generally here in the valley were concerned?

A. No, I did not.

Q. How long had you lived in this valley?

A. I had lived here since '36.

Q. And you have been in the orchard business all that time?

A. Yes, that's true.

Q. Reading the literature, generally, that comes out on the subject, from various sources?

A. Well, I read some.

Q. Well, try to keep yourself up to date, I assume?

A. No, I wouldn't say I do. I'm a very busy farm boy.

Q. You did take time to read some of the things that come out?

A. That's right.

Q. From the state and various other places?

A. Sure.

Q. Did you ever talk with or know any individual grower or [76] growers that used Elgetol before you used it, in 1945?

A. Had I talked with?—

Q. Yes, did you know of any growers that used

(Testimony of E. A. Emerson.)

it, besides yourself, before you started using it in '45?

A. I knew of some that had used it similar to what I had used it, late in the season.

Q. That is, they had used it in 1944?

A. That's right.

Q. And from what you could learn from these growers, did they get good results in 1944?

A. Some got some burn, that they were not really well pleased with the use of it.

Q. I'm not sure I understood—and they were not pleased?

A. Some were not well pleased with the use of it, and some were.

Q. And the ones that were not well pleased with the use of it, was because they had some burns, is that right?

A. That was the complaint they made to me.

Q. And you knew that before you used it at all in 1945, didn't you? A. Yes.

Q. What did you use for mildew, if anything, in 1946? A. I used lime and sulphur.

Q. How many applications? A. One. [77]

Q. When did you apply that?

A. In the pink stage.

Q. Where did you get the information as to how much Elgetol "30" to use in 1944, what mix to mix up?

A. That was given me from the Frank Cubberley office.

(Testimony of E. A. Emerson.)

Q. And you followed that all through the season of '44? A. For the time that I used it.

Q. Yes, a week or two weeks or whatever it was that you used it.

Mr. McKelvy: I think that's all.

Redirect Examination

By Mr. Hawkins:

Q. Mr. Emerson, what was your mildew condition in 1946?

A. Well, I had very similar conditions to what I had in——

Q. In 1945?

A. ——in the earlier season, '45, and '44.

Q. Did the Elgetol that you applied in '45, did that improve the mildew? A. In 1944?

Q. No, the Elgetol that you applied in 1945, could you tell in 1946 whether that application had improved the mildew condition?

A. I couldn't tell that the trees had improved any. In the spring, immediately following the application of the Elgetol, in '44 and even in '45, there seemed to be some improvement in the amount of mildew that was on the trees, [73] for a period of time, probably two or three weeks, but it did show up later in the season, from both cases.

Q. After two or three weeks the mildew reappeared, in both 1944 and 1945?

A. That's right, yes.

Q. Did you get any burn from the lime-sulphur spray in 1946? A. Not any that I noticed.

Q. Did you ever hear of anyone losing a sub-

(Testimony of E. A. Emerson.)

stantial part of his crop as a result of an application of lime-sulphur?

A. It's a rather general question; I don't recall any cases.

Q. I see. When you talked to Dr. Regan between the pink and the calyx spray in 1945, when he was out at your place, did he tell you to watch out for the weather, in any way?

A. No, there was nothing said about the weather at that time.

Q. No; he didn't blame the burn from the first application on the weather, did he?

A. He said that in his opinion that the Elgetol was attacking the mildew, and the mildew was so embedded in the foliage that it was destroying the leaves by destroying the mildew.

Q. The weather played no part in his explanation of what happened? A. No.

Q. I may have asked you this before; did Dr. Regan express any opinion as to the crop that you would have, after that [79] pink spray, when he was out there?

A. He said that in his opinion I had a good crop, and would have to do some thinning, but probably I wouldn't have to do as much thinning as I would have had I not used Elgetol.

Q. He then advised you to proceed with the second Elgetol application? A. Yes.

Q. And you relied on him when you did that?

Mr. McKelvy: Objected to as calling for a conclusion.

(Testimony of E. A. Emerson.)

The Court: Well, I think it is leading; I'll sustain the objection on that ground.

Redirect Examination

(Continued)

Q. Let me put it in another way, if I can. When you put on the second application, why did you do that?

A. Well, I really applied that application because I wanted to control mildew, and I had put on the one application before, I thought maybe I might be getting results from controlling mildew, and I relied entirely on the instructions of Dr. Regan for that, because I would not have used it had I been using my own judgment. I thought there was too much burn in the first application, and I was really afraid to use it.

Q. Going back to a different matter, will you state again [80] what your total expenses of operation were in 1945, total expenses in 1945?

A. Well, I believe I have that. The total expenses for the entire place, for both places, altogether, is twenty five thousand ninety eight dollars and sixty three cents. That includes depreciation.

Q. Now, what additional expense would you have been put to in 1945 had you not used Elgetol, and had a full crop?

A. I would have had some additional expense in thinning, probably a thousand dollars, roughly,

(Testimony of E. A. Emerson.)

would be my guess in the extra expense of thinning, and I would have had some increase in picking.

Q. About how much would that have been?

A. That would have probably run a little over a thousand dollars, figuring on a box basis; maybe twelve hundred dollars.

Q. Twelve hundred dollars?

A. I have an estimate of those that I could give you.

Q. And any other additional expense?

A. There would have been some expense of hauling that fruit.

Q. About how much would that have amounted to?

A. May I refer to notes?

Q. Surely.

A. The extra hauling expense would have run, my estimate is Four hundred thirty nine dollars.

Q. Now, any other expense, additional expense? Would there have been any additional expense in spraying?

A. I don't think there would have been quite as much spraying; I think because of the light crop I probably had to put on an extra spray that I wouldn't have had to had I had a full crop.

Q. Why is that?

A. Well, it sounds silly. When an entire orchard has a full crop of apples you have a smaller percentage of apples that are likely to be attacked by moth or by the worms, the codling moth. If there is a very light crop of apples you will probably have the same number of moth working in the orchard,

(Testimony of E. A. Emerson.)

and there are fewer apples for them to work on, so naturally your percentage in worms runs considerably higher in the light crop. If you have a full crop and control the moth in the first brood, or the first half of the season, and you have a full crop, there isn't so much danger from a very heavy percentage of worms getting into your crop from the second brood of the moth, where if you have a very light crop on those same trees you will have the same number of moths that will get by or come back with the second brood, and then you still have those fewer apples to work on, so your percentage will run considerably higher in the second brood. [82]

Q. So with a light crop your spraying actually cost more than if you had a heavy crop?

A. I wouldn't say that it cost more, but it certainly cost as much.

Q. What about water?

A. Irrigation expenses are all the same, your pruning expenses would all be the same, cultivation, fertilizing, shredding, cover crop, in fact all expenses of growing a crop so far as I can now determine would be the same under either condition, except the thinning of the fruit and the hauling and picking.

Q. I believe you testified on cross-examination that in your calyx spray you hit some of the trees later than the so-called calyx stage, after the calyx had closed?

A. That's right.

Q. Now, what was the effect of the application

(Testimony of E. A. Emerson.)

of Elgetol on those trees as compared with the others?

A. The further advanced the apples were when the calyx spray was applied the less injury was noticed in the trees. That's true with the Delicious on the Tieton place. I had an average crop of Delicious on it, and this Elgetol spray was only applied to that orchard the one time, and that was in the delayed calyx, or it really was the first cover spray after the calyx of the apple had closed.

Q. The weather didn't cause any burn in that orchard? [83]

A. There was no crop damage.

Q. One more matter that we might as well go into if you have it in your book there. Can you tell the jury what you received for your actual 1945 crop?

A. I can give you the receipts by tons of varieties. I don't have a total.

Q. Well, we can get the total, if you can give us the breakdown on that.

A. Do you want that in all varieties, or the ones that are——

Q. Give it to us in all varieties.

A. ——included in this? 1945; I had four tons of McIntosh apples; got four hundred five dollars and thirty four cents per ton, that's orchard run. Delicious, sixty one tons, at one hundred fifteen dollars and twenty five cents per ton. Jonathans, thirty nine tons, at one hundred thirteen dollars and twenty five cents per ton, and Winesaps, forty six tons at one hundred sixteen dollars and seventy

(Testimony of E. A. Emerson.)

five cents per ton; and I had two tons of add varieties at one hundred dollars a ton. Now, that's on the Tieton place.

Q. That's on the Tieton place.

A. Apples on the Gromore was thirteen tons of Red Delicious, at one hundred six dollars per ton; eighteen tons of Jonathans at one hundred dollars per ton; and sixty two tons of Winesaps at one hundred fifteen dollars and fifty [84] cents per ton, on the Growmore place. I don't have the production for pears in this book.

Q. Referring to plaintiff's identification D, have you ever seen that before, or a copy of it?

A. Yes, I think I have; in fact, I'm sure I read this bulletin.

Q. Did you read that before you made your pink application?

Mr. McKelvy: Objected to as leading.

The Court: I'll sustain the objection. You can ask when he saw it.

Redirect Examination

(Continued)

Q. When did you see that?

A. The date I couldn't give, but I received this Ortho News along during that season, and during this last season I received some of them. I was on the mailing list at the time that this would have been mailed out. I read this before all of the mildew spray was applied. I'm not sure that I read it before I started the pink spray.

(Testimony of E. A. Emerson.)

Q. But you did read it before you started the calyx spray?

A. Yes, I read this at the time that it was mailed out to me.

Q. And what is the date on that exhibit?

A. This is April 17, 1945.

Q. And when did you start applying your pink spray?

A. I started in April, about the 26th.

Q. April the 26th? [85] A. Yes.

Q. One further question concerning this explanation that Dr. Regan gave you about the burning of the leaves. What was your observation of the leaves?

A. Well, my observation was that it was not altogether having respect with leaves. It was burning weak leaves and strong leaves very much alike. There were leaves that were being burned that I could see no mildew on, no sign of mildew, but his explanation was that there probably was mildew on those leaves, but it was just not visible.

Mr. Hawkins: You may examine.

Recross-Examination

By Mr. McKelvy:

Q. When did you buy the Elgetol "30" that you were going to use in '45?

A. I bought that at different times.

Q. When did you buy the first that you bought for '45?

A. I believe the first that I bought was on—we

(Testimony of E. A. Emerson.)

have some bills—was on, April, near the first of April, just before dormant spray was applied.

Q. I might give you these, if you want to refresh your recollection, so you can answer my question.

Mr. Hawkins: We can admit those in evidence if you like.

Q. Oh, it doesn't matter. Would you answer my question now?

A. According to this bill the first that I bought was April [86] 2nd.

Q. And then on down the line, different dates?

A. There's one for May 7th; one for April 28th; one for April 11th. I believe that's all that applies to Elgetol.

Q. Now, Mr. Emerson, isn't it a fact that Dr. Regan told you that Elgetol "30" had been used for the purpose of thinning? A. Yes.

Q. In 1944, and that users of the product for thinning had noticed good results on mildew, checking mildew; isn't that what Dr. Regan told you?

A. No, not exactly. He told me that it had been used as a thinner and that it had given practically one hundred per cent control of mildew.

Q. Now, do you remember giving your testimony in a deposition before the court stenographer on the 9th day of March, 1946, in your counsel's office? A. Yes.

Q. I will ask you, referring to page 22 of the transcript of that deposition, if this question and answer was not asked by me and answered by you as follows:

(Testimony of E. A. Emerson.)

“Question: And you were advised or understood from Dr. Regan or others that when it was used for the purpose of thinning they had gotten good results on mildew? Answer: Yes.”

A. That's right.

Q. Now, do I understand you to say that you sprayed your Delicious for the purpose of controlling mildew?

A. As a precaution, really, against mildew.

Q. Didn't have any mildew on the Delicious, did you? A. Well, I—there was some.

Q. That isn't why you sprayed the Delicious with Elgetol, is it? Isn't the reason you sprayed the Delicious, and the thing you told Dr. Regan, is that you wanted to get a chemical thinner to save hand thinning? A. No, that is not true.

Q. I believe you said this morning you weren't troubled to amount to anything with mildew on the Tieton place? A. That's right.

Q. And what you did have there was on the Jons and Winesaps?

A. I said I had more in the Jonathans than in any other variety. There is a little mildew, probably, on all varieties, even the pears.

Q. But you went through the calyx on the Delicious that had very little mildew, if any?

A. That is right.

Q. For the purpose of taking care of mildew with Elgetol, is that right? A. Yes.

Q. Is there such a thing as on and off years with

(Testimony of E. A. Emerson.)

orchards, [88] better crop one year, and off the next year?

A. There's such a thing, yes.

Q. Is that true of the orchards you've just mentioned, the Tieton orchard and the Gromore?

A. I couldn't say about the Gromore. It is not necessarily true of the Tieton orchard. The Gromore orchard has had a good bloom, a good bud crop, each year since I've had it. Some trees, it's true, have more buds some years than they do other, and the Tieton orchard has been a really consistent bearing, or has had a good bloom, for the past several years.

Q. Did you use lime and sulphur to control mildew in '43?

A. I didn't really use it for that, with that specific purpose, for that specific purpose.

Q. But you did use lime and sulphur in '43?

A. I don't know; I may have. I use it some years as a dormant spray. I don't recall whether I did that year or not, but I do some years, and I use oil other years.

Q. You know that orchards do get serious damage various times by the use of various sprays other than Elgetol, isn't that right?

A. Well, I have never seen a case that was exceedingly bad. I have never had a case myself.

Q. You have read and heard about it?

A. I have heard that there's been quite a lot of damage, yes. [89]

Q. For years, is that right?

A. What was the question?

(Testimony of E. A. Emerson.)

Q. Over the past years that's been the history of the thing, isn't that right? A. Yes, I suppose.

Q. Isn't it a fact that you got a better crop in 1946, the year after you used Elgetol "30" you're complaining of, than you ever had on either of those places in their history, so far as you know?

A. On the Tieton place I got a bigger tonnage in '46 than I've ever taken off of it, due to several reasons, I think. I know on the Gromore place I only had the three crops, and it was larger than either of the other two, that's true.

Q. In other words, your answer to my question is "yes"; you got the biggest crop on those places in 1946 since you owned them?

A. Since I owned them, yes.

Mr. McKelvy: That's all.

Redirect Examination

By Mr. Hawkins:

Q. Will you state what those reasons are, Mr. Emerson?

A. Well, the principal reason is that I have been fertilizing very thoroughly, practicing soil conservation practices of mulching, discing in tree prunings, sowing cover crops, and I have improved the fertility of the orchards. [90] I have watched very closely to try to keep them properly irrigated, watered, and I prune very carefully to keep the new growth coming in the trees, which is more consistent bearing than the old wood for year after year crop. They're getting larger; there is more room on them for crops; they're growing, and those,

(Testimony of E. A. Emerson.)

I think, are the reasons, some of the reasons, that they should produce more now than in previous years.

Q. What about this off and on year—was 1945 an “off” year, or an “on” year?

A. I haven’t had an off and on year on the—really, on the Tieton place, since I’ve owned it. I’ve always had a good bloom every year, and the fruit has set satisfactorily, so I could not say that there is, or was, an off and on year since I have owned that orchard. The Gromore place was likewise well budded the three years that I’ve had it. It is true that some of the trees were slightly budded, and almost any year there will be some trees that will not be budded as heavily, probably won’t have a one hundred per cent crop, but comparing the bud crop in ’44 and the bud crop in ’45 on both places, there was equally good bud on the Tieton place both years, and there was probably, there was, a more even bud crop on the Gromore place in ’45 than in ’44. More nearly all the trees were budded. [91]

Mr. McKelvy: That’s all.

Mr. Hawkins: I think that’s all, Mr. Emerson.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Hawkins: Your Honor, I have a witness from Wenatchee that I would like to call out of order, if I may.

The Court: All right, you may call him.

E. L. REEVES

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. E. L. Reeves.

Q. E. L. Reeves; and where do you live, sir?

A. Wenatchee, Washington.

Q. How long have you lived there?

A. Lived there since 1927.

Q. And what is your occupation, sir?

A. My occupation is research plant pathologist for the United States Department of Agriculture.

Q. Research plant pathologist?

A. That's right.

Q. And how long have you had that position?

A. Since 1927.

Q. You carry on certain experimental work in Wenatchee, do [92] you? A. Yes.

Q. In the year 1945 did you carry on any experiments with material known as Elgetol?

A. I did, in cooperation with others, at the State Experiment station there.

Q. State Experiment station in Wenatchee?

A. In the Tree Fruit Branch, Experiment Station of the Washington State College.

Q. I see; and what was the nature of those experiments?

A. The nature of the experiments was to try out new materials, and also old materials, to find

(Testimony of E. L. Reeves.)

out the effect on the control of apple powdery mildew.

Q. And you used Elegtol in your 1945 experiments?

A. Yes, we did; we included Elgetol as one of the trial sprays.

Q. And would you describe to the jury of what your experiments with Elgetol consisted; how you went about it?

A. Do you wish particular dates of application, and so forth, or just in general?

Q. Just in general, first.

A. The experiments that dealt with the use of Elgetol were applied as a pink spray only; as a pink and a calyx spray, in two different applications; and in another lot as a calyx spray only. The strength of the solutions varied. [93] The results of the experiments then were taken on the basis of the amount of damage to the tree from the fungus, the mildew fungus, both as it affected the fruit and as it affected the growth of the tree itself, and observations were also made on any injury to the plant that might be attendant with the application of materials.

Q. Now, would you describe to the jury the results you obtained from those experiments?

A. If I might refer to some of the notes we made of our specific results.

Q. Surely.

A. When applied as a pink spray only, at a strength of either one or two pints of Elgetol to

(Testimony of E. L. Reeves.)

one hundred gallons of water, the control of the markings on the fruit was in general equivalent to what we consider the standard lime-sulphur spray application for control of the mildew to be. As for the control of the twig infections, the control of the twig infection was fair to good, but possibly in general it was judged slightly less than lime-sulphur. Where the pink spray only was applied we had only slight to no foliage injury during the '45 season.

Now, where the calyx spray was used, calyx spray of Elgetol was applied, and the calyx sprays were used in the rate of one pint of Elgetol and one and one-third [94] pints of Elgetol per one hundred gallons, where the calyx sprays were used either following a previous application of a pink spray, or where it was applied for the first time as a calyx spray only, the result was that there was moderate to serious injury of the foliage, and there was a variable fruit dropping. There was no definite percentage that I could give you on the amount of fruit dropping, other than that we did not have sufficient fruits that were picked from those particular trees to allow us to take any reasonable percentage figures that would give us decent results. I believe that about covers it.

Q. Now, in experimenting with materials such as Elgetol, how many years should it be experimented with before you know its characteristics?

Mr. McKelvy: I object to that as calling for a

(Testimony of E. L. Reeves.)

conclusion of the witness, and not a subject of expert testimony.

The Court: I'll overrule the objection, if he knows, as an expert.

A. Well, that would be a matter of opinion, and after all, this was only a one-year experiment, and many experiments, I would say that many experiments were not sufficiently conclusive in that one year to be a straight out and out recommendation. How many years I might have had to conduct [95] it would be a matter of opinion that might be debatable.

Q. Well, what I'm getting at is that you would expect to test it for more than one year?

Mr. McKelvy: Objected to as leading.

The Court: Yes, I think it is leading, started out to be.

Direct Examination
(Continued)

Q. Well, let me put it this way, Mr. Reeves. What kind of material is Elgetol?

A. Elgetol is supposed to be a sodium salt of dinitro cresol.

Q. And in testing materials of that character, how many years do you feel is necessary in order to determine its characteristics, if you know?

Mr. McKelvy: I make the same objections. I think it is the same question.

The Court: Well, I'll overrule the objection.

(Testimony of E. L. Reeves.)

Direct Examination

(Continued)

A. Well, again that might be a matter of opinion.

Q. What we want is just your opinion.

A. The point might be answered in this way. In our experimental work we usually like to have more than one year, preferably two or three years of experimental work prior to definite conclusions.

Mr. Hawkins: You may examine. [96]

Cross-Examination

By Mr. McKelvy:

Q. Mr. Reeves, was there any particular reason that Elgetol as a thinner was particularly in demand during the war?

A. Well, yes, that could be a general question; naturally, I had no experiments with chemical thinners at all, but the matter of desirability of decreased labor would be evident, yes.

Q. When did you first do some work with Elgetol, Mr. Reeves?

A. 1944 was the first year that I worked with Elgetol.

Q. And as I understand it, Elgetol had been used in the east for some years?

A. I have read accounts of their use there for many years, in the 39's and early 40's.

Q. I didn't hear the last.

A. Their use in the east has been in the late 39's and early 40's.

Q. Yes. What type of experiments did you make in 1944 with Elgetol?

(Testimony of E. L. Reeves.)

A. In 1944 I also had cooperative experiments with the other investigators in the tree fruit branch experiment station at Wenatchee. Some of the other workers had applied Elgetol as a chemical thinner for apple trees, on a group of trees, and shortly after, within a period of about three days, I believe it was, three or four days after the material was applied as a chemical thinner it was [97] brought to my attention, or I was asked to look at the trees that had been sprayed, for the purpose of determining whether mildew that had been affected by the application of that spray material during blossom period. I did so, and found that the mildew had been quite effectively stopped by the use of the spray material, therefore I included those particular sprayed trees, or eight of the particular sprayed trees, sprayed during the blossom time, I grouped them in a special block and carried through the observations on those trees that I would ordinarily apply to my other mildew plots.

Q. What did you learn; how did they come out, in other words?

A. That has been published in the proceedings of the 1940 Annual Meeting of the Washington State Horticultural Association.

Q. Yes?

A. And the results were rather good. In fact, we stated in there that while the mildew development on the test trees was rather advanced at the time of the spray application, an appreciable per-

(Testimony of E. L. Reeves.)

centage of the fruit was prevented from becoming marked by mildew, as will be noted by the results shown in the following table 5, and table 5, the results obtained were that where Elgetol—the Elgetol sprayed trees had 43/10 per cent of the fruit seriously [98] marked, that is where over twenty per cent of the fruit surface was marked, 4.3 per cent of the fruit on the sprayed trees were marked, and 17 per cent of the fruit on the unsprayed trees were seriously marked, so as a comparison there, the effectiveness was fairly good; in fact, we considered it reasonably good, with that late spray application, since the application was made from five to six days later than we would prefer to have a powdery mildew spray applied, so we considered the experiment fairly satisfactory, the observations fairly good, rather.

Q. By that do you mean five to six days later than the late full bloom?

A. No, what I mean is this, that we ordinarily apply, or desire to apply, our first mildew spray at the free bloom or pink stage, or possibly even slightly before, in order to obtain the best control. In this particular instance it was applied five to six days after that pink stage, in other words, at the full bloom time, so considering the lateness of the time at which it was applied, we considered the mildew was fairly well stopped for that period.

Q. I believe you reported in the State Horticultural publication you have already mentioned that Elgetol was at least as satisfactory, if not more so,

(Testimony of E. L. Reeves.)

than lime-sulphur, so [99] far as results obtained, isn't that right?

A. Yes, I believe the particular sentence there was "Considering the advanced mildew development at the time of the spray application, the degree of control obtained is in the general range of what might be expected with a lime-sulphur spray applied under similar conditions."

Q. Now, what advantage was there, other than that, so far as the summer sprays are concerned, in using Elgetol instead of lime-sulphur?

A. That comes back to the basic reason for the experiment. The basic reason we were experimenting to find new materials was to find a material which could be safely followed by an oil spray application. We considered Elgetol was a possibility in that direction; that's the reason we were using it.

Q. What is a fungicide, Mr. Reeves?

A. A fungicide is a material that will kill a fungus.

Q. And mildew is a fungus?

A. Mildew is a fungus.

Q. What would you say as to whether or not, in your findings, Elgetol is a good fungicide?

A. I found it to be a good fungicide.

Mr. McKelvy: That's all.

Redirect Examination

By Mr. Hawkins:

Q. Dr. Reeves, or Mr. Reeves, in the 1944 tests

(Testimony of E. L. Reeves.)

the Elgetol [100] was applied at full bloom, is that not right?

A. That is right, and as I stated in the first place, it was not included in our original plans for the experiment; it was taken into the experiment only after others had started.

Q. And this article that counsel has referred to is based upon observations of the use of Elgetol applied at the full bloom stage, is that right?

A. That's right; in 1944 there was only the full bloom stage application.

Q. It was not based upon the application of the Elgetol on the calyx? A. No, it was not.

Q. And as I understand your results in 1945, the damage occurred when the calyx was sprayed?

A. Yes, there was moderate to serious damage to the foliage, and variable dropping of the fruit, when the material was applied in the calyx during the 1945 tests.

Q. So far as you know, Elgetol was not used as a calyx spray in 1944?

A. Well, at least I didn't use it in any of my tests. I have no knowledge of whether it was used by anyone else as a calyx spray.

Mr. Hawkins: I think that's all.

Mr. McKelvy: That's all. [101]

Mr. Hawkins: I wonder if Mr. Reeves could be excused at this time?

Mr. McKelvy: We have no objection, your Honor.

(Testimony of E. L. Reeves.)

The Court: You may be finally excused then, Mr. Reeves.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Hawkins: I wonder if I might recall Dr. Regan at this time for some further questions?

The Court: All right.

WILLIAM S. REGAN

recalled as a witness on behalf of the plaintiffs,
testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Dr. Regan, as I understand it, you are an agent and representative of the defendant corporation, and are head of their field staff, is that not right?

A. I haven't any such title; I am rated as entomologist.

Q. You are employed as an entomologist, is that right? A. Yes.

Q. Do you have any individuals working with you?

A. Working with me, but not necessarily under my supervision after they get their initial experience.

Q. How many other men work with you in your work?

A. During the war there were practically two

(Testimony of William S. Regan.)

men, including myself, and normally we would be having five or six. The [102] result was that two of us were trying to carry on just too much work. Ordinarily we carry on experiments before the materials go into the field. During the war it was absolutely impossible to do it with our force.

Q. Now, you had two other men, or just one other man, besides yourself?

A. Well, there's you might say only one other man in this general area.

Q. In 1945?

A. In 1945, another man who had to cover 'way down into Idaho and up into the Ellensburg country.

Q. When did you first start selling Elgetol in the Yakima valley?

A. In '44, according to my recollections.

Q. And it was sold as a dormant spray?

A. No, it was sold both as a dormant spray and as a bloom thinning spray.

Q. The spray is manufactured as a dormant spray, for the purpose of dormant spray, isn't it?

A. Yes, but you will probably note that the experimenters, the State and Federal men in the east, started using it for bloom thinning.

Q. Well, now, that was one of the reasons you brought in here in 1944?

A. That's right. [103]

Q. Was to try to do something with this bloom thinning problem. Did you run any experiments yourself in connection with bloom thinning?

(Testimony of William S. Regan.)

A. We carried on a very few experiments, and that was purely what you might call grower experiments; where we didn't have the man force to do the work we would give the material to a grower and supervise the job, and then make checks.

Q. You did not experiment on your own property? A. None.

Q. Does the California Spray-Chemical Company own any experimental tracts?

A. Not in this area.

Q. Not in the Yakima valley? A. No.

Q. And what experimental work you do is through the grower?

A. Not at the present time. We've gone back to doing our own experimental work, now that we have the help to do it.

Q. What do you mean by doing it yourself?

A. We take block tests, and put on the applications, or under our direct supervision, where everything is very thoroughly checked.

Q. Do you lease property from some other grower?

A. No; as a matter of fact growers are quite glad to give us part of the orchard to do that. [104]

Q. I see; they turn it over to you and you go ahead and handle the spray program for the year, is that right? A. That's right.

Q. And you put your own men in there now?

A. No, we have some of the men, and the grower's men assist, and as I say, they're very glad to cooperate.

(Testimony of William S. Regan.)

Q. And where the grower does it, you check from time to time and not take his word for it?

A. No; we don't take his word for it.

Q. You can see that yourself; that's what you're doing at the present time? A. That's true.

Q. In 1944 and 1945 you were not doing that yourself?

A. We were not doing it ourselves; we were getting the growers to put on the material, furnishing the material and then checking.

Q. How many experiments did you make in 1944?

A. I would say very few, when you have only two men covering a big territory.

Q. I appreciate that, but would it be two, or ten experiments, or what?

A. Well, it would probably not be more than three or four.

Q. And the Elgetol at that time was applied at full bloom, is that not right?

A. No; as a matter of fact there are quite a number of [105] growers that started in full bloom and sprayed for two weeks, right through the calyx spray.

Q. In 1944 there was little or no damage from the use of Elgetol, is that right?

A. There was very little damage. There may have been an occasional case where some foliage burn occurred, but it was considered in most cases non-commercial.

(Testimony of William S. Regan.)

Q. On the other hand, in 1945 there was quite a bit of damage done throughout the valley?

A. That is true.

Q. In 1944 the spray was not used as a mildew control, was it? That is, it was not first applied for that purpose?

A. No, it was not, primarily, but the growers who observed its action were very much impressed by the effect on mildew, and practically every grower who used it for bloom thinning went back to use it for mildew control in 1945, upon their own observations.

Q. Now, in 1945, you recommend it be applied in the pink and in the calyx?

A. That was not necessarily our recommendation. That's a standard recommendation for the application of mildew sprays, in the pink and—

Q. Well, you referred to that in Exhibit B, I believe. Let's see, I am reading from plaintiff's Exhibit B, the issue of April 17, 1945, of the Ortho News: "Mildew has [106] been severe during the past several years on Jonathans and some other varieties of apples, with some cases of severe injury to D'Anjou and Bartlett Pears and to some varieties of peaches. Growers have the choice of the standard treatment with liquid Lime-Sulphur (2 gallons or more in 100) in the "pink," with follow-up sprays of Wettable Sulfur for calyx or later sprays, if necessary." In other words, the standard or customary time to apply lime-sulphur is in the pink and in the calyx?

(Testimony of William S. Regan.)

A. And possibly follow-up sprays.

Q. "To some, Sulfur would be objectionable because it delays the use of Summer Oil in the spray schedule. The grower also has a choice of Elgetol which has shown good control of mildew and can be followed by Summer Oil in the usual ten-day interval. Suggested dosage—(1) Elgetol $1\frac{1}{2}$ pints in 100 gallons of water in the "pink," when buds are separated in clusters and before the bloom opens, and (2) Elgetol $\frac{1}{2}$ pint in 100 with 3 pounds of Lead Arsenate, in the calyx spray. Note. Be sure the Elgetol is stirred thoroughly in its container before removing the proper dosage. Careful, thorough spraying, with special attention to infected tip growth is essential for Mildew control." Now, in that issue, you did state that the time to spray was the pink and the calyx stages, isn't that right?

A. That was the standard recommendation.

Q. Yes, and that's what you were making for the Elgetol? A. Yes.

Q. Well, now, in 1944, you had no experience with the application of Elgetol in the pink and in the calyx, did you?

A. I don't recall, unless it's some of our actual work.

Q. Well, you don't recall any now?

A. I can't without checking my records.

Q. And in 1945, however, that was the recommended procedure for the application of Elgetol as mildew control? A. That was the suggested.

Q. Yes. Now, I wonder if you would explain

(Testimony of William S. Regan.)

to the jury the theory behind bloom thinning, that is, why you apply your Elgetol at full bloom in order to effect bloom thinning?

A. I might qualify your statement a little bit by saying that it is not always recommended in the full bloom. It may be a delayed full bloom, or when quite a few of the petals are off, which is practically a calyx spray. The theory of bloom thinning by chemical means, and we will say with Elgetol, is that the central element of the bloom is the largest, most vigorous element of the bloom cluster. You might say that the one in the center is the king bloom, and around that are four or five other buds that come out and open up; the bloom opens perhaps one [108] or two days after the central, or king, bloom, it is called. The theory of the bloom thinning is to be certain that the king or central bloom has set; providing you have good weather, pollination has occurred, that is, bees, the various forms of insects that carry pollen; the theory is that the king bloom sets first, and in each cluster, of course, is a king bloom, probably every three or four inches along the branches, smaller branches, and the aim is to have the central bloom, the most vigorous bud, set and develop fruit, and when the petals fall off of that, and the others are still open, the idea is to destroy the rest of the bloom in that cluster so that they will not produce fruit. That is the theory of bloom thinning.

Q. In other words, you wait until the king bloom has set, and then you burn off the other buds?

(Testimony of William S. Regan.)

A. Yes, but we have been—if you look into the literature on bloom thinning, you will find that in case of certain varieties, or if there is any doubt about the king bloom setting, to wait for quite a while, to be sure that you aren't taking your crop.

Q. In other words, you have to be pretty careful with this particular type of spraying?

A. I don't think there is anybody who ever had a thing to do with it who isn't certain of that. [109]

Q. Isn't certain of that? A. Yes.

Q. And the danger, of course, is that you may apply the spray material at too early a stage, and kill your king bloom along with everything else, and then not have a crop?

A. That is possible.

Q. How long, or how many years, does it take to test a material such Elgetol?

Mr. McKelvy: I am objecting to this as outside the issues. I don't believe there is any claim here along this line, in the complaint. It seems to me it is going beyond the issues.

The Court: I'll overrule the objection, if he's able to answer.

A. Please repeat.

Q. I will re-state the question. How many years does it take, in testing a material such as Elgetol, to determine its characteristics?

A. Well, I don't think that was fully a question in this particular case.

Q. I beg pardon?

(Testimony of William S. Regan.)

A. That was not fully a question; nobody stated that exhaustive tests had been carried on.

Q. I agree with you there, one hundred per cent, but what I [110] am getting at is, normally, how long would you expect to test a material?

A. Well, I have an idea it would vary considerably with different types.

Q. In the case of Elgetol it would take several years, three or four years, maybe five years?

A. That might be true, but——

Q. So that you would get a full cycle of weather?

A. Possibly, but growers were of this disposition: The fact was that labor was very scarce during the war; many growers were forced to thin when the fruit was almost ready to harvest. If they could go in with bloom thinning, knowing its hazards, which I think most of them did, they were willing to take the chance and get that early thinning which would not only thin the fruit at a reasonable cost, but detract the vigor into the following crop.

Q. Now, as I understand it, Doctor, you never did really recommend Elgetol for a chemical thinner, did you?

A. Oh, I think so. That is, at least it was mentioned.

Q. Well, didn't you say in one of these issues that Elgetol as a chemical thinner was still uncertain, or something to that effect?

A. Well, you can go back east after ten years

(Testimony of William S. Regan.)

use, and they will still tell you that it is in that questionable stage under certain conditions. [111]

Q. In the May 9th issue of *Ortho News*, Plaintiffs' Exhibit C, under the heading "Other Benefits Possible With Elgetol" (3) "Bloom Thinning—while many growers have reported good results with Elgetol for 'chemical thinning' at bloom time, there are so many variables which might affect results that growers should be well informed of possible hazards before attempting this practice." That was what you stated in that particular issue?

A. That's what they'll still state, back east, after ten years of use.

Q. But you nevertheless told the grower that he had a choice of either lime and sulphur or Elgetol, when no work had been done on the use of Elgetol in the calyx stage, isn't that right, Doctor?

A. We did not tell anybody that there had been exhaustive work; we told them it had been used the year before.

Q. Here's what you said, "The grower also has the choice of Elgetol;" he can use either lime and sulphur or Elgetol, and you stated that at a time when neither you nor anyone else had done any experimental work with Elgetol applied in the calyx stage?

Mr. McKelvy: That's objectionable. The exhibits are in evidence. Counsel now reads from the exhibits and argues them. I object to the question as argumentative. [112]

The Court: I'll permit him to answer.

(Testimony of William S. Regan.)

A. I made the statement a few minutes ago that growers had started in the full bloom and carried it through the calyx spray. That's calyx spray, isn't it?

Q. Also the experimental work?

A. We based these statements on grower use, observations, and the fact that practically every grower who used it the year before came back and used it the following year.

Q. Now, when you do experimental work, you'll take a block of trees here and give it the proposed new treatment, and then you'll take another block of trees adjacent to it and give it the standard treatment, and compare the two; that's the only way you can test anything, isn't that right?

A. Well, I don't think so.

Q. That's one good way.

A. You can test the material—after many years use of lime-sulphur, somebody ought to have a good idea what it will do.

Q. But when it's never been used, I don't see how you can properly tell, Doctor.

A. Yes, but it had been used.

Q. The only experience you had was in the year 1944, when some grower sprayed from full bloom through the calyx, and it was no test block. [113]

A. Yes, but those growers were all satisfied, and came back to use it.

The Court: Wasn't he asked if there was any blocked out?

Mr. McKelvy: The last two weren't questions.

The Court: Read the question.

(Testimony of William S. Regan.)

(Whereupon, the reporter read the last previous question.)

A. We had no test blocks, according to my recollection.

Q. That's right.

Mr. Hawkins: I think that's all.

Mr. McKelvy: That's all, Doctor.

(Whereupon, there being no further questions, the witness was excused.)

The Court: The Court will recess for ten minutes.

(Short recess.)

W. A. LUCE

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. W. A. Luce.

Q. And where do you live, Mr. Luce?

A. Yakima.

Q. And how long have you lived in Yakima?

A. Approximately five years. [114]

Q. And what is your occupation, sir?

A. Extension Agent in Horticulture for the county and State College.

Q. And what is the nature of your work?

(Testimony of W. A. Luce.)

A. It is an educational service to the farmers of Yakima County.

Q. You consult with the growers on their various problems? A. Yes.

Q. Including their spray problems?

A. Yes.

Q. Have you ever heard of the material called Elgetol? A. Yes.

Q. When did you—first, what is Elgetol?

A. Well, I don't think you want the technical description of it, or the scientific description of it, do you?

Q. Well, its a so called dinitro material?

A. It is a dinitro material that has been used in various ways for spraying in the orchards.

Q. It was originally designed as a dormant spray? A. I think you're right, yes.

Q. And when did you first hear of Elgetol, Mr. Luce? A. Oh, approximately 1943 or 1944.

Q. And what was Elgetol used for in 1944?

A. Well, it had been used in the dormants as an aphid egg control, but we had heard about it being used as a blossom [115] spray in the east, so a few growers, I think it was in '43 or '44, tried it out as a blossom spray on some of the heavier blooming varieties, such as Yellow Newtown and Transparents.

Q. Did you inspect any of these orchards that had been chemically thinned with Elgetol?

A. Yes.

(Testimony of W. A. Luce.)

Q. Did you observe any Jonathan orchards so sprayed? A. No.

Q. Or Roman Beauties? A. No.

Q. Or Winesaps?

A. Yes, I saw some Winesaps.

Q. And did you observe the effect that that spray had with respect to mildew?

A. Mildew in the orchards, especially on Yellow Transparents, had been absent; we therefore assumed that it had been a good control for mildew.

Q. Now, in 1945, Elgetol was used definitely as a mildew control by some growers here in the valley? A. Yes.

Q. And did you have occasion to examine any of these orchards? A. Yes.

Q. And what results did you observe?

A. Well, it varied from complete destruction of the crop [116] with no apparent effect on the mildew, to all degrees in that; no injury whatever, perhaps.

Q. And in 1945, the application was in the pink and in the calyx, is that right, for mildew control?

A. There was no recommendation that I know of for application in the pink. The general recommendations that the county and the State College and State department put out did not recommend it in the pink. It was only as a last resort, about May 6th, I think it was, to be exact, that the recommendation or the suggestion was made that Elgetol be tried, because sulphur at that period, when it had not been used in the pink, would probably be disas-

(Testimony of W. A. Luce.)

trous. It was the last resort to try to check the mildew infestation.

Q. Now, lime-sulphur is the standard method for controlling mildew? A. Yes.

Q. Has been for a number of years?

A. A long time.

Q. And what is the customary time of application of the lime and sulphur spray?

A. The general recommendation is to apply a two per cent lime-sulphur in the pink stage, that is, just before any bloom shows, but after the blossom parts have separated. Following that, ordinarily, a calyx application combined [117] with the lead arsenate is recommended.

Q. Does this lime-sulphur spray burn the crop?

A. Very often does, yes.

Q. Very often does; is it a serious burn?

A. It can be. I've seen crops that have been reduced considerably, but in most cases the injury is restricted to the weaker bloom, and when it is put on as a pink spray it seems to have a hardening effect, so by calyx time the injury is much less severe, except in perhaps the case of the Stayman, which is much more susceptible to sulphur injury. You have to start the application in the pre-pink in order to harden it off.

Q. Now, with reference to this dinitro spray, or any new spray, for that matter, how long does it take, if you know, to test such a material and determine its characteristics?

A. Well, I don't believe anybody could answer

(Testimony of W. A. Luce.)

that so it would be of any value here. Ordinarily we feel that at least three to five years is necessary to give us a good idea of what a material is worth.

Q. And so far as you know, Elgetol was not used in the Yakima valley prior to '44?

A. There might have been some in '43, but I couldn't say definitely.

Q. And so far as you know there was no application prior to [118] '45 in the pink and in the calyx?

A. Not to my knowledge.

Mr. Hawkins: That's all; you may examine.

Cross-Examination

By Mr. McKelvy:

Q. Mr. Luce, what is your connection, may I ask, with the county?

A. I am considered an associate extension agent.

Q. I see; and employed and paid by whom?

A. Well, it's a three-way proposition, federal money, state money and county money.

Q. And you have no connection with California Spray-Chemical Company?

A. None whatever.

Q. Now, you have already mentioned in your direct testimony that some suggestion or recommendation was made about using Elgetol in the calyx spray in '45. Was that published?

A. Yes.

Q. And it was prepared by yourself and who else, if anyone else?

A. That is a joint report put out by the county

(Testimony of W. A. Luce.)

extension service, United States Department of Agriculture, Bureau of Entomology and Plant Quarantine, and the State Department of Agriculture.

Q. And that was yourself and Mr. Carver, was it? [119]

A. Mr. Carver and Mr. Newcomber.

Q. Prepared this article as a joint proposition?

A. Right.

(Whereupon, page 6 of Yakima Morning Herald for Sunday, May 6, 1945, was marked Defendant's Exhibit No. 1 for identification.)

(Whereupon, page 10 of Yakima Morning Herald for Sunday, April 15, 1945, was marked Defendant's Exhibit No. 2 for identification.)

Cross Examination

(Continued)

Q. Referring, Mr. Luce, to defendant's exhibits 1 and 2 for identification, these are obviously a part of a newspaper?

A. This one comes first.

Q. Yes, I guess we marked them backwards. 2 comes before 1. Would you just tell us what it is, please?

A. This column "Fruit Spray Information" is prepared especially for the Sunday Herald.

Q. And published in what edition?

A. Oh, it is published in the Sunday edition; also goes to the county newspapers. The radio also has it.

Q. And the date there, I believe, shows Sunday—

A. April 15, 1945.

(Testimony of W. A. Luce.)

Q. Now, the article under "Fruit Spray Information" is that one of the articles you have just referred to as being prepared jointly by you and the other two men? [120] A. Yes.

Q. Now, as to number 1, tell us what that is, please.

A. This is the May 6th issue, about three weeks later; same origin, put out in the same way to the same sources.

Q. And another article under the "Fruit Spray Information"? A. That's right.

Q. That article is prepared in the same manner you referred to defendant's exhibit 2?

A. Right.

Mr. McKelvy: I am offering defendant's 1 and 2 in evidence.

Mr. Hawkins: We object to those, your Honor. In the first place, there is no evidence that they were brought home to the plaintiffs' knowledge; secondly, there is no proper foundation laid for these items. The only possible purpose would be for the purpose of impeaching this witness, and so far as I know there have been no contradictory statements made; no proper foundation whatever for admitting those in evidence as exhibits.

The Court: May I see them, please? Objection overruled. They will be admitted in connection with the cross-examination.

Mr. Hawkins: I beg pardon?

The Court: I say, the objection will be over-

(Testimony of W. A. Luce.)

ruled; they will be admitted in connection with the cross-examination [121] of this witness.

(Whereupon, Defendant's Exhibit No. 1 for identification was admitted in evidence.)

(Whereupon, Defendant's Exhibit No. 2 for identification was admitted in evidence.)

Cross-Examination

(Continued)

Q. As I understand it, the control of mildew in '44 was so good where Elgetol "30" was used that it was considered as very satisfactory for mildew control, as a fungicide?

A. I wouldn't express it just that way. Where Elgetol was used as a blossom spray there was little evidence of mildew development. It had not been put on as a control measure.

Q. But what I was getting at, isn't it a fact that the control of mildew then was so good that from then on it was considered as such? In all fairness to you, I'm reading from one of your answers to a question.

A. Yes, that's correct.

Q. That is correct?

A. I would go further than that. I would say that early in 1945 we suggested to the Prosser Experiment Station that they run a few preliminary tests, because the pressure was so great from the growers' standpoint to use it that we wanted more information, and they tried it in the pink on Jonathans at Prosser without any injury whatsoever,

(Testimony of W. A. Luce.)

and that led us to believe that under the critical condition at calyx spray time, that perhaps that was the last resort to use it, and that's why this suggestion was made in the May 6th issue.

Q. What do you refer to when you say that grower pressure was so great to use the product? What do you mean?

A. Well, through the telephone, and personal call items that come to both Mr. Newcomber and myself, we can judge pretty well what the thinking of the grower is at the time we were putting out those bulletins, and there was very definite interest and demand to know what to do.

Q. Now, in '45, as you say, you had some trouble with Elgetol? I don't mean you did, but the growers that you watched did, is that right?

A. Yes.

Q. How do you account for that trouble that the growers had?

A. Well, personally, I think it was principally due to the weakened condition of the trees that were sprayed, I know that mildewed foliage is weaker than normal foliage. In the second place, the moisture at the time of the spray was unusual, due to unseasonable rains, and the Elgetol practically became a weed killer in that sense. That's my personal version of the injury.

Q. I will ask you if the following question and answer was given, Mr. Luce, at the time you testified in the former [123] trial in the state court, I think that was about April, 1946. 1946, that's

(Testimony of W. A. Luce.)

right; by way of refreshing your recollection: "Question: Yes, and there was some trouble in 1945? Answer: The trouble came principally through the failure of the growers to get on their mildew spray properly; it might be a case of water, it might be a case of they just didn't observe the infestation soon enough." Do you remember giving that answer, is that correct, Mr. Luce?

A. Many growers, it's the human condition, I suppose, they delay it, hoping there wouldn't be a bad mildew year. It is the same every year. Growers will delay to see if there is going to be an infestation before they actually get busy and spray, and if they get beyond the pink stage then they're in trouble. It was on that basis that this suggestion was made in that column.

Q. Do you remember the weather conditions that spring; anything particularly about the weather, or not?

A. I have mentioned that we had a rain about calyx spray time, which was not normal for that period.

Q. From what you know, or knew, of Elgetol "30" and its history in this valley, and its history in the east, I will ask you whether or not Dr. Regan and the other agents of the California Spray-Chemical Company should have reasonably anticipated any serious injury from the [124] use of this product in 1945?

A. I don't think there was anybody that could

(Testimony of W. A. Luce.)

have anticipated the injury that was coming up. I probably talked to everybody that I could find or talk to that did know anything about it, and they couldn't anticipate a thing, but it happened, which is the thing that usually happens when we use some untried material.

Q. Did you have a report on its use in New York or back east?

A. Yes, we had had reports, but they had been on the basis of blossom thinning, and not as mildew sprays.

Q. Do they have mildew in the east, particularly?

A. Not to the point that we do here, no, from what Dr. Boetcher has told me.

Q. I guess what somebody else would tell you would be improper under our rules of evidence. That would be hearsay, you see.

A. All right.

Mr. McKelvy: I think that's all.

Redirect Examination

By Mr. Hawkins:

Q. Mr. Luce, with reference to this testimony that counsel just read, I thought I would read the full report here that you made. This is a question by Mr. McKelvy:

“Question: What did you particularly observe in 1944, first?

“Answer: It wasn't used as a mildew

(Testimony of W. A. Luce.)

spray. It [125] was used probably as a thinning spray, but the control of mildew was so good that from then on it was considered as such.

“Question: Considered as a good spray for mildew?”

“Answer: Yes, and we still don’t know what the characteristics of Elgetol were in all respects, as you will notice from these articles.

“Question: Yes; then there was some trouble in 1945?”

“Answer: The trouble came probably——”

Mr. McKelvy: Principally.

Mr. Hawkins: “The trouble came probably——”

Mr. McKelvy: It is certified principally.

Mr. Hawkins: Well, this is the report that was made right at the time. (Continuing):

“The trouble came probably through the failure of the growers to get on their mildew spray properly; it might be a case of water, it might be a case of they just didn’t observe the infestation soon enough. Many calls were coming to our office for help, and that is the only reason, you will note, it was suggested for control. It was not recommended. It was just something pulled out of the bag to help the

A. That’s right. [126]
growers.”

(Testimony of W. A. Luce.)

Recross-Examination

By Mr. McKelvy:

Q. The next question:

“Question: Mr. Luce, from what you know of Elgetol “30” and its history in the Yakima valley, I will ask you whether or not Dr. Regan and other agents of the defendant here, the California Spray-Chemical Corporation, should have reasonably anticipated any serious injury from the use of this product, Elgetol “30”?”

“Answer: Not to my knowledge; that was not the history of the use of Elgetol up to that period.”

You answered that at that time?

A. Uh huh.

Mr. McKelvy: That’s all.

Redirect Examination

By Mr. Hawkins:

Q. You also testified at that time that from three to five years was necessary in order to determine the characteristics of this material, isn’t that right?

The Court: Perhaps you had better take the stand again.

Q. The question was: you also testified at that time that it took from three to five years testing in order to determine the characteristics of a material such as Elgetol?

(Testimony of W. A. Luce.)

Mr. McKelvy: I don't think he did.

Mr. Hawkins: Oh, yes, he did. Let me examine that.

Redirect Examination

(Continued)

“Question: Do you think one year's experimentation is sufficient to determine the characteristics of a spray such as Elgetol, Mr. Luce?

“Answer: That's not enough for any material.”

That was your testimony, wasn't it? I believe that was your testimony at that time, is that not right?

A. I didn't get the reading.

“Question: Do you think one year's experimentation is sufficient to determine the characteristics of a spray such as Elgetol, Mr. Luce?

“Answer: That's not enough for any material.”

A. That's right.

Mr. Hawkins: That's all.

Mr. McKelvy: That's all, Mr. Luce.

(Whereupon, there being no further questions, the witness was excused.)

Mr. McKelvy: I wonder if we might read defendant's Exhibits 1 and 2 to the jury now?

The Court: Yes, if you wish.

Mr. Hawkins: I suggest that counsel confine the reading just to this article, and not the whole paper.

Mr. McKelvy: I won't read about Gardener's Nursery. The jury can get the benefit of the two year old newspaper. [128]

The Court: I assume the exhibit includes only the article?

Mr. McKelvy: Yes, that's the idea. I refer first to the first, by date, although it is the defendant's Exhibit 2, merely because I handed them wrong to the clerk.

Mr. Hawkins: I wonder if Mr. Luce can be excused at this time?

Mr. McKelvy: He's excused now. He's subpoenaed by the defendant, but I have told him he didn't need to be here today.

The Court: Mr. Luce may be excused.

(Whereupon, Mr. McKelvy read to the Court and the jury the article headed "Fruit Spray Information" in Defendant's Exhibit 2, and the article headed "Fruit Spray Information" in Defendant's Exhibit 1.)

Mr. McKelvy: Thank you, your Honor.

The Court: Call your next witness.

Mr. Hawkins: At this time I will call Mr. Stahler.

H. K. STAHLER

one of the plaintiffs, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please? [129]

A. H. K. Stahler.

Q. And where do you live, Mr. Stahler?

A. Two miles this side of Naches.

Q. Beg pardon?

A. Naches, Washington.

Q. And what is your occupation?

A. Fruit grower.

Q. How long have you been engaged in that occupation? A. Since 1913.

Q. 1913? A. Yes, sir.

Q. Have you had any experience with apples during that time? A. Some.

Q. In fact, most of the time you have worked on apples?

A. Apples and pears, all the time.

Q. Do you operate an orchard at the present time, Mr. Stahler? A. Yes, sir.

Q. Where is that located?

A. Two miles east of Naches city.

Q. And how many acres do you have in this orchard? A. About 85 acres.

Q. Eighty five acres; and in 1945 you had the management of this same orchard? A. Yes.

Q. And for how many years prior to that did

(Testimony of H. K. Stahler.)

you have management [130] of this particular orchard? A. I went up there in '42.

Q. You went up there in '42; and who is the owner of this orchard? A. J. D. Keck.

Q. And what sort of an arrangement do you have with him concerning the operation of the orchard?

A. Well, I get part of the crop, on a crop basis.

Q. And he gets part of the crop, is that right?

A. Yes.

Q. On a percentage basis; and what expenses do you pay?

A. I pay all the labor and I own all the machinery.

Q. And you own all the machinery?

A. Except the spray rig.

Q. Except the spray rig; that is, you furnish all the machinery except the spray rig?

A. Yes, sir.

Q. And Mr. Keck buys the materials?

A. He buys the material.

Q. What kind of apples do you have on this orchard, Mr. Stahler?

A. Jonathans, Winesaps, and Romes.

Q. Jonathans, Winesaps, and Romes?

A. Yes.

Q. What kind of Romes? [131]

A. Standard Romes.

Q. And what is the condition of the trees on your orchard?

A. Well, they're in pretty good shape.

(Testimony of H. K. Stahler.)

Q. Are they young trees or old trees?

A. In the neighborhood of twenty five or twenty seven years old.

Q. Are they good bearing trees?

A. Yes, sir.

Q. Do you have any mildew in your orchard?

A. Quite a little.

Q. How long have you had that condition?

A. Well, it's been there since I've been there.

Q. Since '42? A. Since '42.

Q. And how do you attempt to control the mildew in your orchard?

A. Well, we didn't start it until '45.

Q. I beg your pardon?

A. We didn't try any control until '45.

Q. Until '45, and what did you use in 1945?

A. Elgetol.

Q. Did you use anything in '46? A. Yes.

Q. What did you use in 1946?

A. Lime and sulphur. [132]

Q. In connection with your use of Elgetol in 1945, at what time of the season did you apply it?

A. The first in the pink stage, and later in the calyx.

Q. In what strength of application did you make?

A. We used seven pints to a six hundred gallon tank.

Q. In both applications? A. Yes.

Q. When did you first hear of Elgetol?

A. In '44.

(Testimony of H. K. Stahler.)

Q. From whom did you hear about it?

A. Dr. Regan.

Q. How long have you known Dr. Regan?

A. Oh, I think since '42 or '43; I don't know just when.

Q. He was the field man out in your neighborhood?

A. Yes, for the Ortho.

Q. Representing the California Spray-Chemical Company?

A. Yes, sir.

Q. And did he work out a spray program for you?

A. Yes, sir.

Q. He's done that each year, is that right?

A. Yes.

Q. With respect to the year 1945, what conversation did you have with Dr. Regan concerning your spray program?

A. You mean all of it?

Q. No, in connection with your Elgetol; did he work out a [133] program for you?

A. Yeh, he said to spray in the pink and again in the calyx.

Q. When he first talked to you about Elgetol in 1944 what did he say?

A. He said where they had sprayed with it for a thinner they had good results with mildew.

Q. And did he recommend that you use this product in '45?

A. Yes, sir.

(Whereupon, blank Spray Record Chart with writing on the reverse side thereof was marked Plaintiffs' Exhibit "F" for identification.)

(Testimony of H. K. Stahler.)

Q. Handing you Plaintiff's Identification F, will you state what that is?

A. That is a spray schedule that Dr. Regan gave me.

Q. A spray schedule that Dr. Regan gave you?

A. Yes.

Q. Is that in his handwriting?

A. Yes, sir.

Q. And on the second sheet, what is that?

A. Well, that's—he told me to spray again.

Mr. Hawkins: I will offer Plaintiffs' Exhibit F in evidence. By the way, did you receive copies of the Ortho News in '45? A. No, I didn't.

Mr. McKelvy: Is this marked one exhibit, or two? [134]

Mr. Hawkins: It's just one exhibit.

Mr. McKelvy: We object, then, necessarily. Certainly we don't believe that that second sheet has anything to do with this case, at least it doesn't show at this time that it has. We think the entire exhibit is immaterial and does not go to the issues in this case, incompetent and irrelevant.

Mr. Hawkins: Testimony is that the first page is the formula that Dr. Regan gave Mr. Stahler with respect to the application of Elgetol as a mil-dew control. The second page Mr. Stahler testified was a note left for him by Dr. Regan, telling him to put the spray on again.

Mr. McKelvy: The point of my objection is that the second page has nothing to do with the first

(Testimony of H. K. Stahler.)

page, and as the record stands, it wouldn't be admissible.

The Court: There's nothing in the record to show the dates of these two sheets, is there, or the relationship in time of one to the other?

Direct Examination

(Continued)

Q. Can you state when the first sheet of the plaintiffs' identification F was given to you?

A. I can't exactly, no.

Q. About when was it delivered to you?

The Court: Speak up just a little louder, Mr. Stahler. I doubt if all the jurors can hear you.

A. That would be some time around—well, I don't know just when the pink spray was that year.

Q. With respect to the pink spray, when was that first sheet given to you?

A. About three or four days before the pink spray.

Q. And when was the second sheet given to you?

A. Well, I don't think the second sheet goes with the first sheet.

Q. I see. Do you know when it was given to you? A. It was later in the season.

Q. Later in the season? A. Yes, sir.

Q. I understood your testimony was that the second sheet was a note left by Dr. Regan telling you to put the spray on again.

A. Not the Elgetol; this is a different spray entirely.

(Testimony of H. K. Stahler.)

The Court: I think you had better separate them, counsel, and mark them separately.

(Whereupon, note written on the reverse side of a Spray Record Chart was marked Plaintiffs' Exhibit "G" for identification.)

Mr. Hawkins: At this time we will offer plaintiffs' Identification F in evidence.

Mr. McKelvy: No objection.

The Court: It will be admitted. [136]

(Whereupon, Plaintiffs' Exhibit "F" for identification was admitted in evidence.)

Mr. Hawkins: May I read this to the jury at this time?

The Court: "F"? Yes.

(Whereupon, Mr. Hawkins read Plaintiffs' Exhibit "F" to the Court and jury.)

Direct Examination

(Continued)

Q. Now, did you follow those directions of Dr. Regan's in applying the Elgetol?

A. Yes, sir.

Q. What effect did you notice—first, on what varieties did you apply the Elgetol?

A. Jonathans and Romes.

Q. And what effect did you notice after the pink spray?

A. After the pink spray we only got a slight burn on what we thought was the affected mildew.

(Testimony of H. K. Stahler.)

Q. Did you talk to Dr. Regan between the pink and the calyx sprays?

A. I think I did. I don't remember, now.

Q. Do you recall what he said?

A. No, I don't.

Q. Did you spray again in the calyx with the Elgetol? A. Yes, sir.

Q. And what varieties did you hit that time?

A. The same, Jonathans and Romes.

Q. How about the Winesaps?

A. They was sprayed in full bloom, what I sprayed there.

Q. I beg pardon?

A. The Winesaps were sprayed for a thinner.

Q. They were sprayed for a thinner?

A. Yes.

Q. And what effect did you notice after you sprayed the Jonathans and Romes in the calyx?

A. They kept getting a little worse every day.

Q. What do you mean by that?

A. Well, they kept getting a little—looked as though they were drying up, and the Jonathans all disappeared.

Q. Did the leaves turn brown? A. Yes.

Q. And what happened to the stems of the apples?

A. They turned yellow, and the apples dropped off.

Q. Were there any apples left on your Jonathan orchard?

(Testimony of H. K. Stahler.)

A. Oh, there might have been a box on the whole orchard; a few here and there.

Q. Did you continue to spray and cultivate the Jonathan orchard?

A. Not after that, no.

Q. What crop did you harvest from the Jonathan orchard that year? [138]

A. Not any.

Q. Not any? A. Not any.

Q. You continued to irrigate that orchard, however? A. Oh, yes.

Q. And to cultivate it?

A. You have to take care of them.

Q. But you did not spray it any further that year, and of course you had no picking expense that year, on the Jonathan orchard? A. No.

Q. Now, with respect to your Rome orchard, what did you notice after the Elgetol spray in the calyx?

A. Just about the same as the Jonathan.

Q. You noticed the leaves turning brown?

A. Yes.

Q. And what did you notice about the stems of the apples?

A. They turned yellow, and most of the apples dropped off of those, but not quite as many.

Q. Not as many, but almost all of them?

A. Pretty near.

Q. And with respect to the Winesaps, what did you notice after you sprayed them with the Elgetol?

A. Well, they did the same thing; they just

(Testimony of H. K. Stahler.)

about didn't have any on. Picking time, the pickers wouldn't pick [139] them.

Q. You harvested some Winesaps, however, that year? A. Yes, some.

Q. And did you continue to spray your Romes and your Winesaps?

A. Yes, the Winesaps and Romes we sprayed the rest of the season.

Q. And you continued to water and cultivate those orchards? A. Yes.

Q. How long did you say you have been on this particular orchard, Mr. Stahler?

A. Since '42.

Q. Since 1942; and you have observed the blooms each year, have you not? A. Oh, yes.

Q. And what would you say with respect to the blooms that you had in 1945?

A. Well, outside of the Jonathans, I had a good bloom in 1945.

Q. You had a good bloom in 1945?

A. Yes, sir.

Q. What about your Jon bloom, was that a good bloom? A. No, that was about half.

Q. About half; and that was before the application of the Elgetol? [140] A. Yes, sir.

Q. Now, do you have an off and on year upon your orchard?

A. Well, you might call it that. There's off and on years in all orchards, I guess.

Q. And was 1945 and off or an on year?

A. Should have been an on year.

(Testimony of H. K. Stahler.)

Q. Should have been an on year?

A. Yes.

Q. That is to say, 1944 was a light crop?

A. Yes, sir.

Q. Now, let's assume that you had not used Elgetol in 1945, and had a good crop; would you have had any additional expense over and above the expense that you did have?

A. Yes, we would have had some thinning expense and picking expense, and hauling expense, that you wouldn't have without any crop.

Q. And you would have had some spraying expense on your Jonathans?

A. And some spraying.

Q. Now, can you estimate for us what that picking expense would have been, that extra picking expense?

A. Well, I figured we lost about five thousand boxes of Jonathans, and it was ten cents a box.

Q. And how many boxes of Romes would you estimate that you lost? [141]

A. About the same.

Q. And Winesaps?

A. About five thousand.

Q. Those are loose boxes?

A. Loose boxes, yes.

Q. And what would it have cost you to have picked those additional boxes?

A. Well, that would be in the neighborhood of fifteen hundred dollars.

(Testimony of H. K. Stahler.)

Q. And how much extra would it have cost you to haul those boxes?

A. Well, yard them out, and up to the warehouse, about three cents a box.

Q. About three cents a box; fifteen thousand boxes would be four hundred and fifty dollars?

A. Uh huh.

Q. And what would it have cost you to thin, on account of that extra crop, or lost crop, I should say?

A. Well, that year they were getting from a dollar to a dollar and a half a tree, so I don't know; five or six hundred dollars.

Q. Five or six hundred dollars. That would total up about twenty five hundred dollars in extra expense, so far as labor is concerned, is that right?

A. Something like that. [142]

Q. How do you arrive at your loss of five thousand boxes of Jons, five thousand boxes of Romes, and five thousand boxes of Winesaps?

A. Well, that's an estimate of what the place had bore before.

Q. And the condition of the orchard that it was in that spring?

A. Yes.

Q. What about your mildew condition? Was that reaching a point where it would have reduced your crop?

A. Yes, it would.

Q. And you have taken that into consideration in estimating this loss?

A. Yes.

Q. What was the weather like in the spring of 1945, if you remember?

(Testimony of H. K. Stahler.)

A. It was rather wet.

Q. Did Dr. Reagan advise you to watch out for the wet weather in applying this Elgetol?

A. No, sir.

Q. Mr. Keck handles the selling of the crop, is that right? A. Yes.

Q. And he pays for the spray materials?

A. Yes, sir.

Q. In connection with the spraying, there would be some [143] labor involved there. On your Jonathan crop how many spraying programs or schedules did you omit by virtue of the fact that you lost your entire crop? A. Oh, I think three.

Q. And how many days, ordinarily, did it take for each spray application?

A. About two days with four men.

Q. I beg pardon?

A. Two days, with four men.

Q. Two days for four men; and how much were you paying the men at that time?

A. Eighty five cents an hour.

Q. Eighty five cents an hour; that would be on a ten hour basis? A. Yes.

Mr. Hawkins: I think that's all; you may cross examine.

Cross-Examination

By Mr. McKelvy:

Q. Mr. Stahler, as understand it, you used Elgetol in '45 because Dr. Regan told you that some growers in the valley had used it as a thinner in

(Testimony of H. K. Stahler.)

1944 and that it had controlled mildew, incident to using it as a thinner; is that right, about, or not?

A. That's right.

Q. Regan told you that it had been used as a thinner, [144] apparently satisfactory to some growers in the valley in '44? A. Correct.

Q. He did not tell you that it had been used in the pink or in the calyx in '44, did he, Mr. Stahler? A. No.

Q. Now, I'm not sure that I have heard, maybe these questions may be repitious, but I did not understand whether you sprayed your Winesaps just once, or twice? A. Just once.

Q. With Elgetol? A. Yes.

Q. And that was put on primarily for thinner?

A. Yes, sir.

Q. And where along the line did you apply it? What was the stage of the tree when you put that on? A. Practically full bloom.

Q. Practically full bloom? A. Yes, sir.

Q. Some of the petals were dropping, then, I suppose, or not? A. Just started.

Q. Just starting to drop. Did you have a mildew problem on the Winesaps?

A. Well, not that I know of, on the Winesaps.

Q. And were the Winesaps as bad where you used it as a thinner? Did you get as much damage as you did on Romes or Jons?

A. It didn't seem to be much different.

Q. On the Romes and the Jonathans you used it in the pink and the calyx? A. Yes.

(Testimony of H. K. Stahler.)

Q. The Winesaps just as a thinner, in full bloom, damage about the same on all of them, is that right? A. Yes, sir.

Q. The full bloom is where, compared to the calyx, and how far apart would they be, normally?

A. Well, that would depend on the season, but mostly about ten days.

Q. The full bloom would be about ten days before the calyx, is that right? A. Yes.

Q. Average about that? A. Uh huh.

Q. I believe you said your orchard was about twenty five years old, is that right? Trees about twenty five years old?

A. About that, the most of them, yes. That's a guess with me; I don't know for sure.

Q. Had you known of any grower in the valley that had used [146] Elgetol in 1944 as a thinner, and was satisfied? I mean you, yourself, know of any individual? A. Yes, one.

Q. Was that Mr. Rowe? A. Yes, sir.

Q. He had given a speech, I believe, or a talk, at the meeting of the Horticultural Association in December here in Yakima, hadn't he?

A. Yes, sir.

Q. On the use of Elgetol. Were you there and heard the speech? A. Yes, sir.

Q. Mr. Rowe is a grower in what part of the valley?

A. Well, he's just a——

Q. I mean where is he located?

(Testimony of H. K. Stahler.)

A. He's just on the river, between the upper and the lower Naches valley.

Q. And you heard him make this talk that was later reported in the magazine? A. Yes, sir.

Q. About his experience with Elgetol in '44, is that correct? A. Yes, sir.

Q. And you learned from that source that having used it as a thinner it had also controlled mildew?

A. Yes, sir. [147]

Q. So far as his orchards were concerned, is that correct? A. Yes, sir.

Q. And you were getting to the place there in the orchard where you almost had to do something about the mildew, as far as the Jonathans were concerned, weren't you? A. Yes.

Q. And lime-sulphur would interfere with your summer sprays; is that the reason you didn't want to use it? A. Correct.

Q. Is that correct? A. That's correct.

Q. Did Dr. Regan suggest to you some time during the season that you spray just a couple of rows of the Winesaps, and see how they would do, and then hold it a little bit before you sprayed—remember that?

A. No. He didn't suggest that to me.

Q. Referring to the Winesaps only?

A. Well, the Winesaps there, he told me to spray two rows alongside of the Jonathans, to protect from mildew, yes.

Q. Why did he say to spray the two rows, do you know?

(Testimony of H. K. Stahler.)

A. Well, he thought there would be more mildew on the two rows alongside of the Jonathans than there would be somewhere else.

Q. Did he suggest that you wait and see how you came along with these two rows? [148]

A. No.

Q. You did at that time know that Elgetol was in the experimental stage, so far as using it for mildew control was concerned, didn't you?

A. I knew it was new in the valley.

Q. Pardon me?

A. Yes, I knew it was new in the valley, yes sir.

Q. And you knew that it had been used as a thinner and had in those cases cleaned up the mildew?

A. That's what I had heard.

Q. Nobody had ever told you that it had been used in the pink and calyx before?

A. No.

Q. You assumed that using the Elgetol as you did on the varieties you mentioned was experimental so far as using Elgetol was concerned, didn't you, Mr. Stahler?

A. Well, no; not in my case. I didn't suppose it was experimental.

Q. I mean—not in what case, did you say?

A. I didn't suppose I was experimenting with it when I did it, no.

Q. Well, you remember when I took your deposition March 9, 1946, in Mr. Hawkins' office?

A. Yes, sir.

Q. Before a court reporter. I find these ques-

(Testimony of H. K. Stahler.)

tions and [149] answers on page 16 of the transcript. I guess I'll have to get a start here: (Reads from page 15)

“Question: Did he” (referring to Dr. Regan) “ever tell you that Elgetol 30 had been used solely for mildew control?”

Answer: No.

Question: He told you, I believe, that they had hoped it would work out, because it had got results on mildew when they used it as a thinner, is that right?

Answer: Yes, sir.”

That's correct so far?

A. That's correct.

“Question: You understood that it was in the experimental stage insofar as using it for mildew alone was concerned?

Answer: Well, he claimed it had been used for mildew before, but I never saw it.

Question: You mean it had been used as a thinner?

Answer: As a thinner, yes, and had cleaned up the mildew.

Question: But so far as using it in the pink and the calyx, for the purpose of mildew only, you knew that was experimental?

Answer: Well, I suppose it was. He didn't say [150] so, but I suppose it was.

Question: You assumed it was at that time, I take it?

Answer: Yes.”

(Testimony of H. K. Stahler.)

Q. You remember those questions and answers?

A. Yes, I remember those.

Q. And they are correct?

A. I guess they are.

Q. Did you, at Dr. Regan's suggestion or on your own, spray some D'Anjou pears? A. Yes, sir.

Q. And what spray did you put on the D'Anjous?

A. That was a pink spray.

Q. A pink spray? A. Yes, sir.

Q. And a Calyx later? A. No.

Q. And why did you apply the spray to the pears?

A. The same reason, mildew.

Q. And when did you put them on the pears?

A. That was when they were in the pink.

Q. In the pink; is that about the same time as apples? A. No, it's a little sooner.

Q. What kind of results did you get so far as the pears were concerned? [151]

A. We got good results.

Q. You mean that the Elgetol cleaned up the mildew? A. Most of it.

Q. Had you seen the results on your D'Anjou pears before you started using Elgetol on the apples?

A. Well, the pink spray on the apples didn't seem to do much damage.

Q. But what I mean is this: I may be wrong, but didn't you spray the pears long enough that you could see that it was cleaning up the mildew on the pears, before you started spraying any apples, any variety?

(Testimony of H. K. Stahler.)

A. Well, the mildew on pears doesn't show up very good, and you can't see very much until later in the season.

Q. Were you satisfied with the Elgetol spraying on the pears when you started spraying the apples?

A. Yes, sir.

Q. And you say the pink spray on the apples did no harm? A. Didn't seem to.

Q. It was the calyx spray that caused the trouble, is that it? A. Yes, sir.

Q. And what kind of weather did you have following the calyx spray?

A. Well, it was pretty wet.

Q. Pretty wet? [152]

A. Rainy weather.

Q. The Elgetol cleaned up the mildew so that you got a pretty good crop in '46, didn't you, Mr. Stahler?

A. It cleaned up what was in sight, but every time it rains mildew comes back.

Q. Did you get a good crop on these orchards in '46? A. Yes.

Q. An extra good crop?

A. Not as large as I had before.

Q. Pardon me?

A. Not as many apples as I had before.

Q. Let's see, you had it since '42?

A. Yes.

Q. The orchard's in good shape now?

A. Pretty good shape now.

Q. I wasn't just sure how you figured these five

(Testimony of H. K. Stahler.)

thousand boxes. Why did you say ten cents a box? How do you arrive at that?

A. That was for picking.

Q. Oh, I see. I didn't understand that; and did you place an average on your production before 1945, or take any certain year? How do you arrive at those figures?

A. Well, it's—I don't know, you just kind of get used to it after while, estimating a crop.

Q. You get used to estimating what should have been or what [153] you hope will be, is that right?

A. That's it.

Q. I see. Then sometimes you have kind of a slim crop even when you don't use Elgetol, isn't that right?

A. Oh, once in a while, yes.

Q. I've heard of it. There are a good many causes that go in here toward a crop being small that year, or nil, isn't that right?

A. That particular year, you mean?

Q. Yes sir, that particular year.

A. A good many causes?

Q. Yes.

A. On whose crop, everybody's, or just mine?

Q. Yours. A. Oh, I don't know, no.

Q. Had you had a good crop in '44?

A. '44 was on the Jonathans, was somewhere in the neighborhood of seven thousand boxes, between seven and eight thousand boxes.

Q. Well, is that what you would call a good crop; a large crop? A. No.

Q. How about the Winesaps and Delicious, or

(Testimony of H. K. Stahler.)

the Romes? I mean had you had a big crop in '44, or a small one? A. About an average. [154]

Q. About an average? A. Uh huh.

Q. Was your '44 crop cut down some because of mildew?

A. I don't know. I don't know whether mildew was the cause of it or not. It was cut down some from '43, yes.

Q. Was mildew a problem in your orchard in '44? A. In the Jonathans it was.

Q. Did you have some trouble in '44 getting enough thinners to get the trees thinned fast enough? A. Yes.

Q. That resulted, would result in an off and on year, wouldn't it? In other words, when the thinning isn't done on time it takes a lot of vigor out of the tree, isn't that correct? A. Yes, sir.

Q. And you were anxious to get a chemical thinner if possible to steady the production from year to year, isn't that correct?

A. That's correct.

Q. Had you read reports in the Horticultural Magazine written by Mr. Reeves and his associates?

A. No, I hardly ever read those.

Q. You don't read the Horticultural Magazine at all; and did you read the Ortho News at all, any of them? A. No. [155]

Q. Did you read any of these articles put out by Mr. Luce and Mr. Carver?

A. Yes, I read those once in a while.

(Testimony of H. K. Stahler.)

Q. Did you read these particular two, referred to in evidence as Defendant's Exhibits 1 and 2?

A. Well, now, I couldn't say; I wouldn't remember that far.

Q. You wouldn't remember; how long, over what period of time were you putting the calyx on?

A. That takes about five or six days.

Q. Did you put the calyx on the Jonathans and Romes before or after you applied the thinner on the Saps?

A. The calyx should be afterward.

Q. Do you remember whether you did or not in this particular case?

A. Yeh, the calyx would be afterwards.

Q. It was afterwards? A. Yes.

Q. The calyx on both varieties? A. Yes.

Q. Had you ever had experience with mildew control before using Elgetol?

A. No, I never sprayed for mildew before.

Q. Did you know this standard recommendation as to when to apply mildew spray?

A. Well, I've heard of it, heard it talked about.

Q. And it was in the pink and the calyx?

A. Yes, sir.

Q. You heard that from sources other than Dr. Regan, too, didn't you? A. Oh, yes.

Q. As a grower I take it that you know that was the standard recommendation for a mildew spray, applied in the pink and in the calyx?

A. Yes, sir.

Mr. McKelvy: I think that's all.

(Testimony of H. K. Stahler.)

Redirect Examination

By Mr. Hawkins:

Q. You used lime and sulphur in 1946, is that right? A. Yes, sir.

Q. For a mildew control? A. Yes, sir.

Q. Did you still have mildew in 1946?

A. Yes; there's some there yet.

Q. And what was the respective or comparative conditions in 1945 and 1946 on mildew?

A. Well, in '46 we had a different spring; it wasn't so wet, and the lime and sulphur cleaned it up better.

Q. Beg pardon?

A. Lime and sulphur cleaned the mildew up better in 1946 than it did in 1945.

Q. Than the Elgetol did in 1945? [157]

A. Yes, sir.

Q. You did not use lime and sulphur in 1945, did you? A. No.

Q. Now, Dr. Regan, according to your testimony on cross examination, told you that in 1944 Elgetol had been used for a thinner, and that good results, so far as mildew control, was noticed. That was in '44 he told you that? A. That's right.

Q. And did he tell you that it was applied in the pink and the calyx in '44? A. No.

Q. He told you that it was applied in full bloom in 1944? A. Yeh, for a thinner.

Q. And he not only told you that, but he told you to go ahead and use it as a mildew control in 1945, didn't he?

(Testimony of H. K. Stahler.)

Mr. McKelvy: Objected to as leading.

The Court: That is leading. Objection sustained.

Mr. Hawkins: Well, counsel leaves the inference that Dr. Regan merely told him it was used as a thinner in 1944, and that results were noticed with respect to mildew control. The point I am making is that he not only told him that, but he affirmatively told him to use it as a mildew control.

The Court: Can't you bring out what you want without leading the witness? [158]

Redirect Examination

(Continued)

Q. What else did Dr. Regan tell you besides that it had shown good results in '44?

A. Well, I don't remember what he said about that. He just thought it would control it in '45, if it controlled mildew as a thinner; he thought it would work as a regular mildew spray.

Q. I notice that Plaintiff's Exhibit F refers to a calyx spray. Did he write out a card for you with the pink spray, in connection with the pink spray?

A. I don't believe he did.

Q. He just told you that orally?

A. Yes.

Q. And you followed his instruction in the application?

A. Yes, sir.

Q. Did Dr. Regan advise you how long this material had been tested?

A. No.

Q. Did he tell you that it had been used in the east for some time?

A. Yes.

Q. As a commercial thinner, or chemical thinner, I mean?

(Testimony of H. K. Stahler.)

A. Well, he didn't really say what it was used for, but he said it had been used in the east before. I don't remember what he said for. [159]

Mr. Hawkins: I notice it is twenty-five minutes to five. Does your Honor wish to adjourn?

The Court: Will it take some time?

Mr. Hawkins: Yes, I want to go into some other matters with this witness.

The Court: The Court will adjourn, then, until tomorrow morning at ten o'clock, and the jury will remember the instruction given as to not discussing the case with anybody, and keeping an open mind about it.

(Whereupon, a recess was taken in this cause until Tuesday, January 28, 1947, at ten o'clock a.m.) [160]

Yakima, Washington, January 28, 1947
10 o'clock a.m.

(All parties present as before, and the trial was resumed.)

The Court: It isn't too easy to hear in this courtroom, and I am going to request counsel and the witnesses who testify to speak up, and speak distinctly, so that the jurors can hear you. That applies to the attorneys and witnesses and myself and everyone else who talks here, because the jury isn't in a position to perform their duties unless they hear what goes on in the courtroom. You may proceed.

(Testimony of H. K. Stahler.)

Redirect Examination of H. K. Stahler

(Continued)

By Mr. Hawkins:

Q. Mr. Stahler, I didn't quite understand what you had to say about the two rows of Winesaps yesterday.

A. The two rows of Winesaps were beside the Jonathans, and we sprayed those as a precaution, so the mildew wouldn't spread any further.

Q. And what spray did you apply on those two rows of Winesaps?

A. I think that was the calyx spray, if I remember right.

Q. The calyx spray?

A. I think so; just one spray.

Q. Now, as I understand your testimony, you sprayed one [162] block of Winesaps as a thinner?

A. Yes, sir.

Q. Or for the purpose of thinning them, is that right?

A. That's right.

Q. And was there another block of Winesaps that you did not spray at all, with Elgetol, I mean?

A. Yes, sir.

Q. And what sort of a crop did you have on that block that you did not spray at all?

A. We had a pretty good crop.

Q. Now, in going over the items of extra expense that you would have been put to had you had a full crop, there is one item, I think, that we overlooked yesterday, and that was the spray material. I believe

(Testimony of H. K. Stahler.)

you testified as to the amount of labor that would have been necessary had you given the Jons these three extra sprays, but you did not testify as to the material. What would the material have cost in 1945 for those three sprays?

A. Well, somewhere around seven hundred dollars I think would cover it.

Q. Something in the neighborhood of seven hundred dollars? A. I think so.

Q. And then that sum of seven hundred dollars would have to be added to the figures you gave yesterday? A. Yes. [163]

Q. To determine the amount of extra cost that you would have been put to, is that right?

A. Yes, sir.

Q. Now, as I understand it, you sprayed all of your Jonathan orchard with Elgetol?

A. Yes, sir.

Q. In the pink and in the calyx?

A. Both sprays.

Q. And you sprayed your Romes in the pink and in the calyx, is that right? A. Yes.

Q. But with your Winesaps, two rows of Winesaps you sprayed in the calyx for mildew?

A. Yes.

Q. And a certain block you sprayed as a thinner?

A. That's right.

Q. And the remainder of your Winesaps you did not spray with Elgetol, is that right?

A. That's right.

Mr. Hawkins: I think that's all.

(Testimony of H. K. Stahler.)

Recross-Examination

By Mr. McKelvy:

Q. Mr. Stahler, why didn't you spray the so-called remainder of your Winesaps?

A. Well, I had that block there that was so heavy with bloom I didn't want to thin by hand, and the rest of it [164] wasn't quite as heavy, and I only had two days to do it in, so I couldn't do it all.

Q. What?

A. Couldn't do it all in two days.

Q. Did you thin them by hand?

A. Yes, sir.

Mr. McKelvy: That's all.

Mr. Hawkins: That's all.

(Whereupon, there being no further questions, the witness was excused.)

JOHN P. EVANS

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. John P. Evans.

Q. John P. Evans. Where do you live, Mr. Evans?

A. Yakima.

Q. And how long have you lived in Yakima?

A. Since 1913.

(Testimony of John P. Evans.)

Q. And what is your occupation, sir?

A. Auditor of the Yakima County Horticultural Union.

Q. Would you speak up just a little bit louder, Mr. Evans?

A. Auditor of the Yakima County Horticultural Union.

Q. And how long have you had that position?

A. Thirty years. [165]

Q. Thirty years; and what are your duties as auditor, Mr. Evans?

A. Everything in connection with the accounting and the records of the organization.

Q. And do you come in contact with the prices that are paid for fruit—apples? A. Yes.

Q. Each year? A. Yes.

Q. And you are familiar with the prices paid for apples each year? A. Yes.

Q. To the grower? A. Yes.

Q. And do you have the figures for 1945, the Jonathan apple figures? A. I do.

Q. Would you state to the jury what those were?

A. We paid the growers net on extra fancy and fancy combination, 216 and larger, one hundred seventeen dollars and eighty-two cents; sizes 234 to 252, one hundred fourteen dollars and eighty-six cents; on jitneys, those are apples smaller than 252, sixty-five dollars twenty cents; on the C-grade—

Q. Just a moment; are those figures per ton?

A. Yes. On the C-grade, two and a quarter inches and larger, one hundred seventeen dollars

(Testimony of John P. Evans.)

and eighty-two cents; and on smaller than two and a quarter, forty-three dollars and ninety cents. For the two and a quarter and larger culls, forty-eight dollars a ton, and the small culls, twenty-eight dollars a ton.

Q. And those were the fair market prices of Jonathan apples in 1945?

A. I would presume so, Mr. Hawkins; we handled 2065 tons.

Q. And that was the price paid on those; and what figures do you have on Winesaps?

A. Extra fancy and fancy combination, 216 and larger, one hundred sixteen dollars and forty cents; 234's and 252's, one hundred thirteen dollars and eighty cents; and smaller than that, one hundred four dollars and forty cents. C-grade, two and a quarter and larger, one hundred sixteen dollars and forty cents; the smaller than that, forty-two dollars and forty cents. The large culls, fifty-five dollars and sixty-two cents, and the small, twenty-eight dollars.

Q. Can you tell us, just for the purposes of comparison, how many pounds of apples there are in a loose box, on the average, or would you be prepared to answer that?

A. It varies according to the texture of the apple, but they'll run forty-four to forty-six pounds. [167]

Q. You're speaking of a packed box, now?

A. Standard packed boxes.

Q. I'm asking about a loose box.

A. A loose box of Winesaps?

(Testimony of John P. Evans.)

Q. Let's say Winesaps, yes.

A. Winesaps will run about thirty-three and one-third, in a standard box.

Q. And what about Jonathans, what will they run?

A. They're a little lighter than that, probably half a pound.

Q. They would run about thirty-two pounds to the box, loose? A. Yes.

Q. Now, would you give us your figures on market prices of Roman Beauties?

A. The combination extra fancy and fancy, 216 and larger, one hundred eighteen dollars and eighteen cents; 234's to 252's, one hundred sixteen dollars and forty cents; the small were forty-three dollars and forty cents. C-grade, two and a quarter and larger, one hundred eighteen dollars and eighteen cents; small, forty-three dollars and forty cents. Large culls, fifty-five dollars and seventy cents, small culls, twenty-eight dollars.

Q. Now, all of these figures that you have given apply to the year 1945, and they are the fair market values in 1945? [168]

A. In Romes we handled about 2600 tons, and in the Winesaps, 18,200 tons.

Q. In your opinion that is a large enough tonnage to give an idea of what the market value is, is that right? A. Yes.

Q. Could you tell us how many pounds in the loose box there would be of Romes, on the average?

A. About thirty-two and one-third.

(Testimony of John P. Evans.)

Q. About thirty-two and one-third pounds.

Mr. Hawkins: That's all; you may examine.

Mr. McKelvy: No questions.

Mr. Hawkins: That's all, Mr. Evans. May Mr. Evans be excused at this time, your Honor?

Mr. McKelvy: We have no objection.

The Court: All right, you may be excused.

(Whereupon, there being no further questions, the witness was excused.)

J. D. KECK

one of the plaintiffs, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Mr. Keck, will you state your full name, please? A. J. D. Keck.

Q. And where do you live, sir?

A. In Yakima. [169]

Q. How long have you lived in Yakima?

A. Four months less than fifty-two years.

Q. Do you own an orchard out in Naches?

A. Yes, sir.

Q. How large an orchard is that?

A. There's about 110 acres in the ranch; about 35 acres of waste land and roads; about 85 acres in tillable crops or orchard.

Q. And you have this 85 acres planted to orchard?

(Testimony of J. D. Keck.)

A. All within excepting probably an acre.

Q. And what kind of trees do you have in the orchard?

A. There are D'Anjou pears, Jonathans, Delicious, Winesaps, and Romes.

Q. How old an orchard is this orchard?

A. The first trees were planted along about 1907, and the last planting, as I recall, was about 1922 or 1923.

Q. You planted this orchard pretty largely yourself? A. Yes.

Q. You were the owner of this orchard in 1945?

A. Yes, sir.

Q. And still are? A. Yes, sir.

Q. Mr. Stahler, who was on the witness stand here, has some arrangement with you for the operation of that orchard?

A. Yes, a crop share basis. [170]

Q. Would you explain to the jury what that is?

A. I furnish the stationary power spray plant; I furnish all the spray material, and then I pay the taxes, pay the water, maintain the buildings, pay the insurance; Mr. Stahler does all the labor, spraying, pruning, thinning, hauling fruit to the warehouse, and then the fruit is sold by the Horticultural Union and the money is divided between us.

Q. Do you handle the sale of the fruit to the Horticultural Union?

A. Well, we both have contracts with the Union, so that the percentage of the fruit—his percentage

(Testimony of J. D. Keck.)

of the fruit is his, and my percentage of the fruit is mine, but coming altogether in at one time, arrangement was worked out with the Union whereby it is handled under a joint account, and then the money divided, and to simplify things, I do practically all the accounting and bookkeeping with the Union, and with their employees, all the figuring. After that then Mr. Stahler and I go over the records; he has one set of them and I have a set.

Q. Do you have the production records covering the years '42 through '46? A. I do.

Q. I wonder if we may have those?

(Whereupon, a group of statements and receipts issued by Yakima [171] County Horticultural Union was marked Plaintiffs' Exhibit "H" for identification.)

Direct Examination
(Continued)

Q. Mr. Keck, I am handing you plaintiffs' Exhibit H for identification. Will you state what those records are?

A. Those are the account sales, together with the pack-out slips of the three varieties of fruit for the years mentioned there.

Q. 1942 through 1946?

A. Yes, except that the dates on these account sales are in the spring of the year following crop. In other words, these are the dates in which the final tabulation of the fruit was made, and like in the Jonathans, Romes, and Saps, the final sales are

(Testimony of J. D. Keck.)

not completed until the following year in which the fruit is grown.

Q. In other words, this first sheet is dated April 21, 1943; to which crop does that refer?

A. To the 1942 crop.

Q. And that is true with each of these records?

A. Yes, sir.

Q. The next one refers to July 14, 1943, and that would be your 1942 crop?

A. '42 crop; except that in the '46 crop, I have nothing here except the pack-out on the Jonathans. The Winesaps and Romes have not been completed in the pack-out, so I have [172] nothing in that, and of course the account sales have not been made, and will not be made until some time the middle of this summer.

Q. Now, just for the purpose of explaining briefly what is in these records, does that show the poundage of Jonathans sold?

A. That shows the number of pounds of fruit delivered to the Horticultural Union.

Q. From this orchard?

A. From this orchard.

Q. Now, then, you have analyzed those records, have you not? A. Yes, sir.

Q. And have you averaged the tonnage that you obtained, excluding the year 1945? A. Yes.

Q. And would you tell the jury what those averages are? I will offer Plaintiffs' H in evidence.

Mr. McKelvy: I would like to be sure that I

(Testimony of J. D. Keck.)

heard correctly what years they are; 1942, 1943 and 1946?

Mr. Hawkins: 1942 through 1946.

A. Yes, 1942, 1943, 1944, 1945, and the pack-out of Jonathans in 1946.

Mr. McKelvy: I see.

The Court: Do these documents apply to all varieties, or just certain of them? [173]

A. Jonathans, Winesaps, and Romes.

Mr. Hawkins: Just the varieties we're concerned with here.

Mr. McKelvy: We have no objection to the offer, your Honor.

The Court: Admitted.

(Whereupon, Plaintiffs' Exhibit "H" for identification was admitted in evidence.)

Direct Examination

(Continued)

A. You want the average tonnage of 1942, 1943, 1944 and 1946; on the Jonathans was 141.82 tons.

Q. In other words, from 1942 through 1946, excluding 1945, you averaged 141.82 tons per year of Jonathans? A. Correct.

The Court: This is just a computation of the averages from Exhibit H?

Mr. Hawkins: That's right.

Direct Examination

(Continued)

Q. And what figure do you have on Saps?

(Testimony of J. D. Keck.)

A. An average for those same four years of 309.934 tons.

Q. 309 tons average; and what is your average over those years on your Romes?

A. 220.443 tons.

Q. What do your records show was your actual production in 1945? [174]

A. There was no Jonathans at all. I might deviate from that in this way, and say that there probably was an occasional apple through the orchard; there was none picked for commercial use, or even for home use.

Q. That was the year your orchard was sprayed with Elgetol? A. Yes, sir.

Q. And what was your actual production of Saps in '45? A. 243.956 tons.

Q. And what was your actual production of Romes in 1945? A. 85.326 tons.

Q. And can you state from those records what your estimated loss in 1945 was?

A. Taking it from the average, it will put the Jons at 141 tons, and the Winesaps at 66 tons, and the Romes at 135 tons.

Q. Now, with respect to your Jonathans, you had no crop in 1945? A. No.

Q. Did you from Exhibit H estimate the average per cent of those various varieties, that Mr. Evans has referred to? A. Yes, I have.

Q. And applying those average percentages against the 141 tons of Jonathans, what figure do you arrive at as being the fair market value, or would

(Testimony of J. D. Keck.)

have been the fair market value, of that 1945 Jonathan crop? [175]

Mr. McKelvy: Object to the question, because the record as it now stands shows the operator of this orchard did not expect a full crop in 1945, regardless of Elgetol.

The Court: Well, I will overrule the objection, and let it come in for what it is worth.

A. Fourteen thousand one hundred forty dollars and sixty-six cents.

Q. Fourteen thousand one hundred dollars and sixty-six cents? A. Yes.

Q. Now, with respect to the Saps—

The Court: Was that the Jonathans you just referred to? A. Yes, sir.

Q. Now, with respect to the Saps, you did have some crop of Winesaps in 1945?

A. In 1945 we had an actual tonnage of 243.956.

Q. And you took the percentages?

A. I used the percentages for the same prices and the same percentages as those actually sold in 1945.

Q. And applied that to the loss of sixty-six tons?

A. Yes, sir.

Q. And what figure did you arrive at as to your loss in connection with your Winesaps? [176]

A. Seven thousand four hundred thirty two dollars and eighty two cents.

Q. And with respect to the Romes?

A. I used the same method there as I did with the Saps, because we had Saps, I mean Romes, that

(Testimony of J. D. Keck.)

year, and using the same manner of figuring, arrived at a figure of fourteen thousand seven hundred seventy three dollars and sixteen cents, and adding the three together makes a total of thirty six thousand three hundred forty six dollars and sixty four cents.

Mr. Hawkins: Your Honor, at this time I would like to move that the complaint of Mr. Keck and Mr. Stahler against the California Spray-Chemical Corporation be amended so that the amount asked be increased from the twenty one thousand to the thirty six thousand dollar figure that Mr. Keck just testified to. I think the amendment is in order, because it is in accord with the testimony that has been introduced by Mr. Keck, and we ask that it be made at this time.

The Court: I believe I will have the jury step out during this discussion.

(Whereupon, the following proceedings were had without the presence of the jury:)

Mr. Hawkins: I might suggest to counsel at this time that we will probably be through with our case very [177] shortly.

The Court: Then I assume there will be a motion or motions to make?

Mr. McKelvy: Yes.

The Court: Do you have objections to this amendment?

Mr. McKelvy: Yes, I very strenuously object to the amendment, first, for the reason, of course, it comes entirely as a surprise to us; this is not a

(Testimony of J. D. Keck.)

matter that should have to develop in trial, when this case has been on file since the first day of September, 1945; that's the date of the complaint, in any event. That very material and substantial difference puts us in a position now where we will have no chance at all of checking it, but in the second place, under the evidence, this testimony, as indicated by my objection, is upon the plaintiff's own record, in any event. Mr. Stahler, your Honor will remember, said that he did not expect more than half a crop in the Jonathans, regardless of Elgetol, and some other low percentage, I think, in other varieties; so that's asking for an amendment of over sixteen thousand dollars, and certainly puts the defendant in a place where we would have no opportunity whatsoever to check on it, and it is a very substantial difference.

The Court: Well, if it were anything else except amount, here, I would be very reluctant to grant it, particularly without giving the defendant a chance for continuance if they thought they needed it, but I think I will grant this motion for an amendment, because it does apply only to the amount, and I assume that amount would depend upon the production of apples during that year and the price during 1945 and other years, and that's a matter that should have been checked by the defendants. I don't know whether it would make a great deal of difference in the character of the checking whether they claim twenty one thousand or thirty six thousand. Of course the matter

(Testimony of J. D. Keck.)

of what could have been expected during 1945 I think is a matter of defense, to show they're not entitled to the amount claimed, but on the basis that no substantial prejudice results to the defendants, I will grant the motion to amend.

Mr. McKelvy: Exception.

The Court: Yes, and allow an exception. Do you want to amend this by interlineation? It is the one, just the Keck case.

Mr. Hawkins: Your Honor, do you care to have instructions submitted to you by the respective parties?

The Court: Yes, I would like to have them.

Mr. Hawkins: I have them ready at any time your Honor wishes them. [179]

The Court: All right, you can submit them any time before the close of court today, because I wouldn't have time to go over them until tonight anyway.

Mr. Hawkins: The witness just called my attention to the fact that the reason we did not have the records until recently was because, of course, the 1945 crop isn't packed out until well into 1946, and at the time the complaint was drafted and these pleadings were brought to issue it was impossible to get these figures.

Witness: The dates on my exhibit there will show the dates on which they were available in 1946.

The Court: You may bring in the jury.

(Testimony of J. D. Keck.)

(Whereupon, the following proceedings were had within the presence of the jury:)

Mr. Hawkins: You may cross-examine, counsel.

Cross-Examination

By Mr. McKelvy:

Q. Mr. Keck, what kind of a crop did you have on your place in 1946?

A. Well, referring to the records here, we had a good crop.

Q. What kind of a crop was it in '46 compared to '44, large or small?

A. From the records, it was a heavier crop.

Q. Heavier crop in 1946?

A. In 1946, than 1944.

Q. Let's see, you compared, or averaged, the years from [180] 1942 through 1946, exclusive of 1945?

A. Yes, sir.

Q. Was 1946 the best crop that you had on that place during any of those years, that is, 1942, 1943, 1944, 1945, and 1946?

A. Well, now, no; 1943, the Jonathans and Saps were heavier than in '46; the Romes were a little lighter.

Q. Would it be fair to say that judging from the years you have known about that orchard, that '46 was about as good a crop as you ever get or ever expect to get?

A. I think it was a good, fair, or a big crop,

(Testimony of J. D. Keck.)

yes. Now, some years might boost one variety a little bit more, or one down.

A. I understand.

Mr. McKelvy: That's all, thank you.

Mr. Hawkins: That's all, Mr. Keck.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Hawkins: I would like to call Mr. Matson at this time.

HAROLD MATSON

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Your name, sir?

A. Harold Matson. [181]

Q. Where do you live?

A. Seven miles northwest of Yakima.

Q. And you work for the California Spray-Chemical Corporation? A. I do.

Q. And how long have you worked for them?

A. Off and on, for six years.

Q. You're working for them at the present time, are you not? A. I am.

Q. And you were working for them in 1945?

A. Part of that year.

Q. And also in 1944?

(Testimony of Harold Matson.)

A. Yes, part of that year, too.

Q. And during those years '44 and '45 your company was the sole distributor of Elgetol in the Yakima Valley, isn't that right?

A. That's right.

Mr. Hawkins: That's all.

Mr. McKelvy: No questions. That's all; you may step down.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Hawkins: The plaintiffs rest, your Honor.

Mr. McKelvy: At this time, we would like to take up a matter with the Court in the absence of the jury. [182]

The Court: Yes, I will have to ask the jury to go out again.

(Whereupon, the following proceedings were had without the presence of the jury:)

Mr. McKelvy: At this time, the plaintiffs in each of the cases consolidated here for trial having rested, the defendant in each case challenges the legal sufficiency of the plaintiffs' evidence in each of the cases now on trial, and moves the Court for dismissal of each case with prejudice on the following grounds and reasons: First, that the plaintiff has failed to—let me say this for the record; when I say plaintiffs, the same thing applies to each case unless I indicate otherwise; the plaintiffs have failed to sustain the burden of proving any action-

able fact or facts, regardless of what theory the complaint or the case may be brought. There is no warranty; no sale; therefore, under the law of this jurisdiction, no warranty, which is an incident of a sale. The plaintiffs' evidence has fallen short.

The Court: If you will pardon me for interrupting, I would like to ask Mr. Hawkins at this time if there is any contention on behalf of either of these plaintiffs that they directly or indirectly purchased this spray material from the defendant corporation?

Mr. Hawkins: The testimony is that they bought [183] the spray from dealers, and that the California Spray-Chemical Corporation was the only distributor of the product Elgetol in the valley. We do not rely on an implied warranty of sale, because there was no sale between the California Spray-Chemical Corporation and the plaintiffs. Does that answer your question?

The Court: The reason I ask that question, in the Morris Hardware case, it was held that the grower plaintiff purchased through the Wenatchee Produce Company, but the Wenatchee Produce Company had been financing the grower, and the court took the position that the Wenatchee Produce had bought the spray material from the Morris Hardware as an agent of the grower. I wondered if you were claiming any such situation here?

Mr. Hawkins: No.

The Court: You're not claiming implied warranty, then?

Mr. Hawkins: No.

Mr. McKelvy: The plaintiffs have failed to produce any evidence showing any negligence on the part of the defendant, and further, that any actionable negligence, if proven, is not actionable under the law of this jurisdiction, inasmuch as the product involved here does not involve life or limb, nor is it liable to in the future, nor does the case deal with an inherently dangerous [184] product such as the rule has been applied where there was no sale. Further, that the evidence falls short of showing or making a prima facie case on the theory of fraud by clear, cogent and convincing evidence. None of the elements are present, nor could the trier of the facts conclude from the evidence that the elements required are here. Fraud is not proven here even by preponderance, and the law being that clear, cogent and convincing evidence is something more than preponderance makes it clear that the record is insufficient to go beyond this point on that question. Next, for the reason that the plaintiffs have failed to show that they relied upon any statement or recommendation made by the defendant, which was a statement of anything other than an opinion or an actual fact. In other words, there is no showing here of reliance by the plaintiffs upon some statement which was made that was not a fact, or that was more than an opinion, based on the fact that the product had been used in 1944 here in the valley by certain growers. On that subject I should say this, that the plaintiffs knew the source of information that the defendant based its statements upon through its agents, and therefore

were in the same basis and required to use judgment, their own judgment, in investigation and in application of the product, the same as the defendant. [185] Finally, the plaintiffs have failed to show that the proximate cause of the loss of which they here complain was the result of using Elgetol. True, they have shown a loss or a short crop in 1945, but the law is that they must go beyond merely showing that there was a loss, that they used Elgetol, and thereby conclude that it was caused by the use of Elgetol.

There are many causes; the plaintiffs here admit themselves that trouble from sprays arises, and weather, and one plaintiff agreed that he did not expect a full crop. Finally, in connection with the damages claimed here, we at this time move to strike all of the testimony in connection with the alleged damages in the Emerson case, first, for the reason that the evidence does not bring that question beyond a mere conjecture; if a jury or trier of the fact would have to decide the question of damages now it would have to indulge in speculation, or guess, because the evidence shows there was a certain amount of cost of operating, a certain amount taken in, but pears were involved there; there is no evidence at all of what the pears brought, or what they cost, so that right now, if we said to the jury, "What was Emerson's damage?" they would have to indulge in speculation. We move that question be stricken because of the inadequacy of the evidence. The same motion [186] is made in the Keck case, to strike the evidence of

damages and withdraw the question at this time, for the reason that that plaintiff has not sustained the burden of proving by preponderance that the damage he complains of was caused by Elgetol, and has failed to show by preponderance of evidence what the damage was, if there was any damage by Elgetol. The jury here would again have to speculate, so far as the Keck case is concerned, if they were to decide the question of damages at this time.

Now, your Honor, I don't know how much you want to hear at this time, on this subject, but we have just handed your Honor a memorandum that may or may not be helpful, and a copy to counsel. I have no way of knowing from the pleadings, or even from the evidence here, exactly what counsel claims is the case that will take it past this point, but at least I can address myself to those things which I think did arise in the evidence, and possibly have something to talk about.

The Court: Well, I think that I would like to have your motions fully covered. Use a reasonable economy of time, but I would like to have them fully covered, because I had proceeded on the erroneous assumption that this was an implied warranty case. I think it is evident from the pleadings, when you examine [187] them closely, that it is not, but I wasn't here on the motion to dismiss or any preliminary proceedings.

(Whereupon, Mr. McKelvy addressed the Court in support of his motions on behalf of the defendant; Mr. Hawkins addressed the

Court in opposition to the motions of the defendant; and Mrs. Curry addressed the Court in support of the motions on behalf of the defendant.)

(Whereupon, a recess was taken until 2:00 o'clock p.m.)

Yakima, Washington

January 28, 1947

2:00 o'Clock P.M.

(Whereupon the following proceedings were had without the presence of the jury.)

(All parties present as before.)

(Whereupon, Mr. Hawkins addressed the Court in opposition to the motions of the defendant.)

The Court: The rule seems to be pretty well settled in this state that so far as express or implied warranty is concerned, each purchaser must look to his immediate vendor if he is to recover either on the theory of express or implied warranty, but there are certain well-defined exceptions; as Judge Chadwick pointed out in the Mazzetti case, in 75 Washington 622, the exceptions are where the thing sold is noxious or dangerous, or where there is fraud or deceit on the [188] part of the seller in inducing the purchaser to buy, or where there has been negligence in respect to the sale of the thing not imminently dangerous. At least by the weight of authority that third exception seems to have

been limited to things that are imminently dangerous to life or health.

However, I am not so sure that under the circumstances of this case, where, as counsel has pointed out, a distributor of the product undertakes to give specific directions as to how it shall be used, for a purpose other than the purpose for which it was manufactured, and of course here I have to take any substantial evidence as true—the evidence must be considered in the light most favorable to the plaintiff, for the purpose of these motions, I am not so sure that there isn't the duty of care on the part of one supervising or directing as to how a grower should apply this spray, and if there isn't that due care, then it seems to me there is some negligence on the part of the defendant. At any rate, I am going to deny the motions at this stage of the proceedings. I have said what I have said merely to indicate what the Court is thinking about, and I assume they will be renewed at the conclusion of the defendant's evidence, and will again be considered before the case is submitted to the jury. You may proceed. [189]

Mr. McKelvy: May I ask a question, having in mind instructions?

The Court: Well, I think before you ask the question I will try to clarify my position a little more. I think here the plaintiffs under the evidence before the court could not rely upon express or implied warranty. I don't believe there is enough here that would enable them to recover on the theory of fraud or deceit. I think if they are

going to the jury at all it must be upon the theory advanced by their counsel, that under the peculiar circumstances here, there was the duty of care on the part of the defendant and its agent, Dr. Regan, not to recommend—not merely recommend, but to specifically direct that this spray be used for a particular purpose, and give definite and specific instructions as to how it should be applied; that they owed the duty of care in determining whether or not it was safe for that purpose, and if there was any negligence or breach of that due care, there might be a liability. Now, that's the only theory the court has in mind.

Mr. McKelvy: Well, that answers my question that I was going to ask.

(Whereupon, the following proceedings were had within the presence of the jury.)

(Whereupon, Mr. McKelvy made an opening statement [190] to the jury on behalf of the defendant.) [191]

FRED C. SQUIRE

called as a witness on behalf of the defendant, being being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy: [217]

Q. What is your name, please?

A. Fred C. Squire.

Q. Where do you live, Mr. Squire?

(Testimony of Fred C. Squire.)

A. About four and a half miles west of Yakima, on the Naches highway.

Q. And what is your business?

A. Orchardist and bookkeeper.

Q. You're bookkeeper where?

A. At the Yakima Farmers Supply Company.

Q. Do you handle spray goods there as well as other things? A. Yes, sir.

Q. How much of an orchard do you operate?

A. Fifty-five acres.

Q. Where is it located?

A. Part of it is where I live, and part of it is on Fruitvale Boulevard and Franklin Avenue, just west of town, about three miles.

Q. Have you ever used Elgetol?

A. Yes, sir.

Q. Have you ever used it in the pink, for mildew control? A. Yes, sir.

Q. Have you ever used it in the calyx, primarily for mildew control? A. No.

Q. When did you first use Elgetol? [218]

A. 1944.

Q. And how did you use it then?

A. I used it for thinning purposes that year.

Q. And how much—do you remember how much you used to a hundred gallons, or how?

A. I think we used a pint to the hundred.

Q. And what results did you get from Elgetol in 1944?

A. Very, very satisfactory, from a thinning standpoint.

(Testimony of Fred C. Squire.)

Q. Did you notice anything at all about mildew control in 1944?

A. I don't remember that we were bothered with mildew that year.

Q. And did you use it in 1945? A. Yes.

Q. Over how much orchard, would you say, in 1945?

A. Well, we used it on all the same things that we did in 1944, Jonathans and Romes. We have one ten acres of which, oh, I would guess probably five acres of it is Jonathans and Romes, mostly Romes, a small lot of Jonathans.

Q. And how did you use Elgetol in 1945?

A. I used it on the Jonathans in the pink for mildew purposes, and then in full bloom again as thinner, same as the year before.

Q. And how much did you use in the pink? [219]

A. A pint, if I remember correctly, that same dosage as we did.

Q. And how much did you use in the calyx in 1945? A. Didn't use any.

Q. I think you said the late bloom?

A. We used it in full bloom, for thinning.

Q. And what mix did you use there?

A. Pint, as I remember it, pint to the hundred gallons.

Q. And what kind of results did you get in 1945 on mildew control, if any?

A. Quite satisfactory.

Q. And how about the thinning?

A. It was satisfactory.

(Testimony of Fred C. Squire.)

Q. Did you use it in 1946?

A. We used it for thinning purposes on trees with full bloom, I would guess about half, from half to two-thirds of the same acreage which we did the year before.

Q. And did you get any results at all in 1946, satisfactory or not?

A. Same results that we had been having, yes.

Q. Do you expect to use it in 1947 in the orchard?

A. With full bloom conditions being the same as they have been, yes.

Q. Do you know when Elgetol first came to the valley here?

A. Far as I know, 1944 was the first year that it was used, [220] maybe with the exception of very few small experiments.

Q. Did you handle Elgetol? A. Yes, sir.

Q. Do you now? A. Yes, sir.

Q. You have been in the business here quite a while. I would like to ask Mr. Squire, if you know whether or not there is a standard recommendation or standard practice as to when a mildew spray should be applied, regardless of whether it is Elgetol or any other material?

A. Well, in case of bad mildew, the general recommendations, as I remember them, are to start with a pre-pink, then a pink, then a calyx:

Q. Pre-pink, pink, and calyx? A. Yes.

Mr. McKelvy: You may cross-examine.

(Testimony of Fred C. Squire.)

Cross-Examination

By Mr. Hawkins:

Q. The standard spray for mildew is lime and sulphur, is it not, Mr. Squire? A. Yes, sir.

Q. Are there any other sprays that are used for mildew control. A. Elgetol was.

Q. It is not generally being used now, is it?

A. Not generally, no. [221]

Q. Not for mildew control. You buy your Elgetol, or the Yakima Farmers Supply buys their Elgetol, from California Spray?

A. That's right.

Q. And do you give out recommendations with respect to its use?

Mr. McKelvy: I object to that as immaterial here.

The Court: I don't think it is proper cross-examination. I'll sustain the objection.

Cross-Examination

(Continued)

Q. You spoke of experiments before 1944 with the use of Elgetol in this valley. Did you know of any, personally?

A. I don't know; I said I didn't know whether there was any, for sure, or not. There might have been a few small amounts used.

Q. Do you know of any? A. No, I do not.

Q. The first time your company handled Elgetol was in 1944, isn't that right?

(Testimony of Fred C. Squire.)

A. I don't know; we may have handled it in 1943 for dormant application.

Q. For a dormant spray?

A. I don't remember.

Q. It was not sold as a thinner prior to 1944, was it?

A. Far as I know, no. [222]

Q. There is no one else in the valley that distributes Elgetol besides the California Spray-Chemical Corporation?

A. So far as I know not.

Q. Was your crop reduced in 1945?

A. No.

Q. You had good thinning?

A. Well, it was good to the point of commercial effectiveness, yes.

Q. That is, it killed all the blossoms but the king blossom, generally speaking?

A. I wouldn't say it killed all the blossoms but the king blossom, no. It thinned the crop enough that we had to do very little hand thinning. We still had a good crop.

Q. When you thin a tree about how many apples do you usually knock off, assuming that you have a good set to begin with?

A. I can't answer that as to percentage.

Q. About three fourths?

A. If you've got a real heavy bloom you might have to take off as high as seventy five per cent, with an exceedingly heavy bloom.

Q. If this is to be a good thinner, then, you

(Testimony of Fred C. Squire.)

would have to kill about seventy five per cent of the blooms, isn't that right?

A. I doubt if that would be true. [223]

Q. If it killed half of the blooms it would be?

A. Probably would be a pretty effective job.

Q. It would be an effective job if it killed one half? In other words, if it is to be effective as a thinner it should kill about half of the blooms?

A. With a full bloom, yes.

Q. And of course, if you don't have a full bloom you wouldn't use it?

A. That's correct; I don't use it unless I have a good bloom.

Q. You yourself wouldn't use it unless you had a full bloom? A. That's correct.

Q. Now, as I understand it, you have never used Elgetol in your calyx spray, is that correct?

A. That is correct.

Q. And when you speak of the usual method of applying a mildew control being in the pink and in the calyx, you're speaking principally of the lime and sulphur spray, isn't that right?

A. That's what the recommendations are for, yes.

Redirect Examination

By Mr. McKelvy:

Q. Do you handle lime and sulphur spray at the Yakima Farmers Supply? A. Yes, sir.

Q. Now, when you used this on the Jonathans

(Testimony of Fred C. Squire.)

for mildew in [224] 1945, did you get good control of mildew, or not? A. Very good.

Q. Did you get any damage to the trees or to the foliage? A. No.

Mr. McKelvy: I think that's all.

Recross-Examination

By Mr. Hawkins:

Q. An action has been brought against your company for Elgetol spray damage, isn't that right?

Mr. McKelvy: I object to that as not proper cross-examination.

The Court: I'll overrule the objection, to show interest.

A. I understand that there is, yes.

(Whereupon, there being no further question, the witness was excused.) [225]

WILLIAM S. REGAN

recalled as a witness on behalf of the defendant, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Your name? A. William S. Regan.

Q. You live here in Yakima, Dr. Regan? [247]

A. I do.

Q. And what is your profession?

A. I am an entomologist.

Q. Would you give us something of your work,

(Testimony of William S. Regan)

and your qualifications as an entomologist, that is, what studying you did, what schools you attended?

A. I took my Bachelor of Science at the Massachusetts State College, and after graduation I was with the State Department of Agriculture for about six years, five years, perhaps, then I went back and finished my work for Doctor of Science.

Q. And you received your Doctor of Science at what school?

A. At the same institution. I was in the Department there, teaching, from 1915 to 1921, and then I had an opportunity to go to Montana and I was there for about three years, and then came to Yakima.

Q. Came to Yakima. Fishing was better in Yakima, was it? A. Excuse me?

Q. Was the fishing better than in Montana?

A. Not any better than Montana. No, I'd like to go back.

Q. You came here in what year?

A. In '25.

Q. Then what type of work have you done here in the valley since 1925?

A. Well, in the earlier days I had quite a bit of experimental work to do, and during the odd moments I would call on growers to discuss their problems with them, and gradually it developed into a certain amount of advisory work.

Q. Have the problems of the growers changed at all during the time you have been here?

A. They have changed a great deal.

(Testimony of William S. Regan)

Q. Has mildew become a problem with apple growing, and pears, and other things?

A. It seems that mildew works in cycles. We have periods of years when the mildew is not bad, due to, you might say, warm, dry weather, and then we might get a cycle of years when there is more rain, humidity, and warm weather along with that promotes mildew.

Q. You have been employed by the California Spray-Chemical Company since 1925?

A. That's right.

Q. Now, was Elgetol used here in the valley in 1944?

A. Yes.

Q. To what extent, Doctor?

A. Well, there are quite a number of growers who used it, primarily for bloom thinning.

Q. And what results did they get, generally?

A. I think they were almost entirely satisfactory. If there were any other results it was lack of thinning rather [248] than over-thinning.

Q. Was anything observed in 1944 by the growers that used it, as to mildew control?

A. Yes, many growers reported that there was outstanding control of mildew.

Q. What do you know, or did you know, of Elgetol, so far as any use of it in any part of the country is concerned?

A. We knew very little excepting reports that we had had from the east.

Q. Had it been used in the east before?

(Testimony of William S. Regan)

A. Yes, it had been used there quite a number of years.

Q. Did your concern get it here for the purpose of chemical thinner, or for what purpose?

A. Well, quite a number of growers apparently had been reading articles, apparently, about the work that was done in the east with this material, and asked us if we couldn't obtain it for them.

Q. And did you obtain it for them?

A. We did.

Q. Now, after the growers reported some control of mildew in 1944, what happened in 1945 so far as mildew was concerned?

A. Well, many of these growers made up their minds on their own observation that they wanted to use this material for mildew control. [249]

Q. Wasn't there sort of a gap on mildew control so far as sprays were concerned, at that time?

A. I don't—

Q. Did they have anything that would check and take care of mildew other than Elgetol?

A. Well, lime and sulphur was the standard material, but many growers were not getting satisfactory control with lime and sulphur, and in the second place, if they used lime-sulphur it would delay the use of summer oil to a point where codling moth, as it did in some instances, took over the crop. That's why growers were interested in some material that offered prospects of doing a fair job on the mildew.

(Testimony of William S. Regan)

Q. Was there any problem so far as thinning was concerned, at that time?

A. Well, labor was scarce at that time, due to the war, and many of the jobs of thinning were so delayed, due to difficulty in obtaining help, that fruit was pretty well sized up before it was thinned, and that put a very heavy drain on the crop for the following year.

Q. Now, so far as the use of Elgetol is concerned, when did you first talk with, we'll take Mr. Emerson first. I don't know as you can give us the exact date, but about, and how it happened.

A. The first time I met Mr. Emerson, or heard his voice, was just after he had applied the pink spray, he called the office, and I believe it was the next day I went out, in company with one of our men from California. Mr. Emerson was working on his spray rig in the upper part of the orchard. He took us down to show us, I think, Winesaps, and maybe Delicious, that he had sprayed in the pink, and he told us that he had sprayed with Elgetol the year before. He was extremely enthusiastic about it, said that it was about the best, I would say the best, mildew control material that he had ever used or had heard about, for that matter. He said that over on the other orchard, this was at the Tieton orchard, he said that over on the other orchard, I believe he calls that the Gromore orchard, there was some evidence of foliage burn, wanted to know if we wouldn't come over and look it over, and see what we thought about it, so we made an appoint-

(Testimony of William S. Regan.)

ment for the next day, and met Mr. Emerson on the orchard. There was some added burn on the foliage over the usual condition, that is, where the mildew is dried up by the Elgetol, and it seemed to be all on yellow foliage, yellow foliage we call chlorosis, and that appears to be due to an iron deficiency. We pointed that out, since this added burn seemed to be entirely on these yellow leaves, but Mr. Emerson didn't seem to think that it was serious, and didn't offer very much comment about it. [250]

Q. Did you have any talk there with Mr. Emerson, or did he inquire of you as to the advisability of using Elgetol for chemical thinning after having used it in the pink?

A. Mr. Emerson asked us, he said that he expected a pretty good bloom coming up, and asked us what about this chemical thinning. We said that growers had used it the year before for that purpose, and appeared to have been satisfied, and I referred him to Mr. Brackett, with whom he could talk and get any added information that he might want.

Q. You referred him to Mr. Brackett. Was that the gentleman on the stand; or his son, with the DuPont Company? A. Yes.

Q. The old man?

A. The old gentleman, yes.

Q. Now, this last conversation you mentioned was the same time you went out to the Gromore ranch? A. Yes.

(Testimony of William S. Regan.)

Q. Did you talk, or anyone in your office talk with Mr. Emerson at all about using Elgetol until—before the pink spray had been applied?

A. Mr. Emerson used it entirely without our knowledge in 1944, and I did not know that he was using it until after the pink spray was on in 1945.

Q. Did you tell Mr. Emerson how much, what mixture to use in [251] the calyx in 1945?

A. I have no knowledge of that.

Q. You say you don't remember whether you told Mr. Emerson how much to use or not?

A. No, I did not tell him.

Q. You did not? A. No.

Q. Now, did you talk with Mr. Emerson on any other occasion than the one you've already mentioned?

A. I think Mr. Emerson was in the office later in the summer to talk about what had occurred on the orchard. That's the only other time that I recall.

Q. Did Mr. Emerson discuss with you at the time you were at the orchard or any other time the advisability of applying Elgetol in the calyx, to control mildew?

A. That was never discussed.

Q. Dr. Regan, in using mildew sprays, regardless of whether it is Elgetol or not, is there any standard recommendation as to when it should be used?

A. The standard recommendation for mildew control is the pink and calyx, and some additional

(Testimony of William S. Regan.)

sprayings, depending upon the severity of the mildew. Sometimes the pre-pink application is advised.

Q. Why is it used or recommended to be used in the pink or pre-pink, for mildew? [252]

A. To destroy the early infection.

Q. And why recommended to be used in the calyx?

A. As a follow-up spray, because the terminal buds are later in opening, and are not opened sufficiently so that the pre-pink or pink can cover that new growth on the terminals.

Q. Incidentally, is there any particular standards or standard or definite cut and dried rules as to how, what program you use, and when the sprays are applied, in raising apples?

A. Well, there is the standard, but it will vary to a great extent in different areas around the valley. We talk about the dormant spray, and then for codling moth, the calyx and cover sprays.

Q. Were there any signs of mildew on the Emerson orchards at the time you visited them?

A. There was evidence of mildew at the Gro-more place; very little, I think, at the Tieton place.

Q. Dr. Regan, did you tell Mr. Emerson that in your opinion the Elgetol would control the two-spot mite?

A. I don't recall discussing that. It is possible, because we know that dinitro materials are effective against mites.

Q. Did you tell Mr. Emerson that you did not

(Testimony of William S. Regan.)

think there was any cause for alarm, when you went out to the ranch? [253]

A. No, I don't—I didn't make any statement, according to my memory, to that effect.

Q. Did you think that there was any cause for alarm?

A. As I mentioned a moment ago, in addition to the mildew tips which were drying up after the application, the rest of the foliage trouble seemed to be due to an abnormal foliage condition, that is, this yellow condition, and for some reason the Elgetol was causing some burn on that type of foliage.

Q. Did you tell Mr. Emerson at that time that he should come back with a calyx to take care of terminal growth?

A. My memory of what I discussed with Mr. Emerson was entirely on bloom thinning. Mr. Emerson was very much sold on the mildew control with Elgetol, and apparently it was not necessary to discuss that further with him.

Q. Did you tell Mr. Emerson that it seemed to you that there was more damage there than you had seen before during that season? I'm trying to read my own writing.

A. I think that is correct, that due to this chlorotic or off-condition foliage, there was more evidence of burn than I had seen.

Q. Now, did you ever at any time tell Mr. Emerson that your company had experimented with Elgetol?

A. No, I did not.

(Testimony of William S. Regan.)

Q. Did you ever tell Mr. Emerson that you knew anything about [254] its mildew control ability, we will put it that way, other than what you learned from growers that used it in 1944 here in the valley?

A. No.

Q. Did you actually know anything about mildew control, other than what you learned from the growers themselves during 1944?

A. Simply what we saw following the 1944 application.

Q. When you told Mr. Emerson of what reports you had had from growers in the valley as to mildew control, did you tell him the truth? Were your statements true?

A. They surely were, and as I mentioned a moment ago, my first discussion with Mr. Emerson indicated that he was very much impressed with Elgetol, on his own experience.

Q. Did you believe the statements that you made to Mr. Emerson, at the time you made them?

A. I certainly did.

Q. Doctor, is there damage ever done by applying sprays other than Elgetol?

A. There is hardly a spray material on the market today which will not cause injury under some conditions.

Q. Have you heard of other seasons, other products than Elgetol causing some burn or damage?

A. Yes. You will find in the recommendations of the Western Cooperative Spray Project Conference advice to [255] be careful about the use of

(Testimony of William S. Regan.)

lime-sulphur, that may not be the exact expression, especially on Delicious, and at certain periods there may be a very severe loss of crop.

Q. Do you know of any case of your own experience where there was damage from the use of lime and sulphur for mildew control?

A. Yes.

Q. Was that in the nature of burn?

A. Yes, and crop reduction.

Q. Now, if mildew is untreated, you have mildew in the orchard, does it affect that year's crop, and does it affect the next year's crop?

A. Well, it is difficult—I think it requires a build-up over a period of some several years before you get the—it's progressive; in other words, when the initial infection takes place, we'll say in one year, due to favorable conditions for the development of mildew that year it may not be too severe, perhaps some loss of fruit, and towards the end of the season some of the buds drying up and failing to open the following year, and if you get the proper cycle of weather it is progressively severe, and eventually reduces the crop.

Q. Would an orchard with mildew untreated in 1945 have affected the crop in that year, at all?

A. No such a thing as a crop that had not been previously [256] affected in this valley with mildew, in the mildew areas; it would be, in the cycle of years when mildew was increasingly bad, and 1945 was just another year.

Q. Now, getting to the Keck ranch, when did

(Testimony of William S. Regan.)

you first talk with Mr. Stahler in that year?

A. I believe that was in 1943, some neighboring grower upon whom I was calling said that Mr. Stahler would like to have me call.

Q. Have you known Mr. Stahler for some time?

A. I have known him for several years, yes.

Q. And did you discuss this matter of Elgetol with him in 1943? A. In 1943?

Q. When did you first discuss Elgetol with Mr. Stahler? A. It was in the early season of '45.

Q. And on what occasion?

A. We were in the orchard walking around looking over conditions; a block of Jonathans had an extremely bad case of mildew. I think one of the worst that I've seen in the valley, and had arrived at that stage where the crop was very heavily reduced.

Q. Had Mr. Stahler sprayed yet, used Elgetol at that time? A. No.

Q. How did you happen to be in the orchard?

A. Well, I believe Mr. Stahler had taken me down to look [257] over a block of D'Anjou pears that he said were badly infected with mildew the year before.

Q. All right; what was said at that time, as near as you can remember, as to the use of Elgetol, between you and Mr. Stahler?

A. Mr. Stahler had something of a severe codling moth problem coming up, and didn't want to use lime and sulphur because of the delay in using the summer oil-lead combination. We talked over

(Testimony of William S. Regan.)

the matter of lime-sulphur, and since you're not supposed to use that because it would interfere with his summer program for codling moth, the only other alternative available was Elgetol, which I mentioned. I believe he had heard about it before.

Q. What did you tell him at that time about using Elgetol?

A. Told him all we knew about it was that it had been used the year before and showed very good results, according to all the growers and what I had seen myself.

Q. And did you tell him it had been used as a mildew spray, or as a thinning spray, before?

A. I told him it had been used as a thinning spray, and that incidentally, the mildew had been stopped quite effectively.

Q. When did you see Mr. Stahler next, when you discussed Elgetol?

A. The first time that I was there was quite early, I think [258] about the dormant period or slightly after that, and some time later, and before it would be time for a pink spray, I think that I talked it over again with him, and he suggested that I write out a suggested program for the Jonathans, the Romes, and the D'Anjou pears.

Q. Did you do that? A. I did.

Q. Is that the exhibit that's here in evidence, Exhibit F, is it?

A. It's in my writing, yes.

Q. I guess it isn't dated, but this is the thing

(Testimony of William S. Regan.)

that you wrote out for him, the second time you saw him, is that right?

A. There must have been something before that, because this talks only about calyx spray.

Q. I see; did you write out anything, or just talk with him about the pink spray, if you remember?

A. Well, I'm sure I talked with him. Whether I wrote out anything I can't be certain.

Q. Why did you recommend, if you did, that the spray be made in the calyx for mildew?

A. It is standard recommendation for mildew control.

Q. And why did you suggest that it be used in the pink for mildew control?

A. That is also standard recommendation. [259]

Q. Were you ever out at the Keck ranch when the crew was spraying, during the season of 1945?

A. Yes.

Q. Now, did he spray the pears that you have mentioned?

A. Yes.

Q. And those were D'Anjou pears?

A. Yes.

Q. How would you compare the D'Anjou pears with apples as to delicacy, I mean the plant, the tree?

A. Well, the D'Anjou pear is notoriously a sort of a tender fruit.

Q. And do you know what sprays were applied to the pears?

A. There was a pink spray with Elgetol, applied for mildew.

(Testimony of William S. Regan.)

Q. And was that before the apples were sprayed?

A. That was before, because that's an earlier blooming variety or kind of fruit.

Q. What results followed the application of the pink spray on the D'Anjou pears?

A. Apparently it stopped the mildew very effectively, because at harvest the fruit was very free from mildew markings, whereas the year before I believe that Mr. Stahler said that fully half of the fruit was mildew marked.

Q. Now, could you tell by looking at the D'Anjou pear trees whether the pink spray had checked the mildew before the [260] spray was started on the apples?

A. Yes; there are several days, I believe, in there.

Q. Did you and Mr. Stahler discuss the apparent results on the D'Anjou pears before they started spraying the Elgetol on the apples?

A. I don't think we did.

Q. What was said as to Winesaps, as to how many should be sprayed with Elgetol, by you or Mr. Stahler?

A. There was an orchard road between the Jonathans and the Winesaps.

Q. A road, you say?

A. Yes, and there was a very little mildew on some of those Winesaps, and what appeared to be a pretty good bloom coming up. We discussed the matter of bloom thinning, and I told him that the year before some growers had used it and seemed to

(Testimony of William S. Regan.)

be quite well pleased, but I suggested that he just take two short rows and spray them, and wait until the tail end of the bloom, to be sure that he had a set.

Q. What did he do? Did he follow your advice or suggestion?

A. No, he went in and sprayed earlier, I would call it pretty nearly a full bloom application, and furthermore, he didn't stop there, he just went right ahead and sprayed a whole block.

Q. Why did you suggest that he spray a couple of small rows [261] and wait for the other?

A. I didn't expect he was going any more, because it was a test application.

Q. Did you tell Mr. Stahler that Elgetol was still in the test stage?

A. Well, it couldn't be in any other, from just one year's experience.

Q. What was the condition of the Jonathan orchard on the Keck ranch, so far as mildew is concerned?

A. As I mentioned, it was one of the worst cases of mildew that I've seen in the valley, and it had been for several years.

Q. Did Mr. Stahler ever tell you prior to this trial what percentage of the crop he expected if he hadn't used the Elgetol in the Jonathans in 1945?

A. We discussed the matter of crop and the matter of mildew, and the discussion led around to the fact that the mildew was so bad that he might just as well do something as let the mildew take

(Testimony of William S. Regan.)

the place, and the crop, according to my recollections, was estimated somewhere about a quarter of a crop as prospective for that year.

Q. That's because of mildew? A. Yes.

Q. Now, Dr. Regan, you were here and heard the figures given as to the crop in 1946 on the Stahler ranch; I will ask [262] you whether or not in your opinion the use of Elgetol, we'll take the Jonathans first, on the Stahler ranch in 1945, cleaned it up so as to allow a good crop in 1946?

A. I don't think that the Elgetol under the conditions did much of a job, not what we expected, but I examined the buds later in the season, and it appeared to me that the buds were forming in pretty good shape for '46.

Q. And do you credit any of that to the use of Elgetol in 1945, or not?

A. I don't know how much credit you could give the Elgetol, the weather conditions—the fact was that the mildew was so bad and the Elgetol took so much of the foliage, going in after the infection, which is fairly typical of the material, that that may account for some of the reduction of the crop, due to the destruction of the foliage, mildewed foliage.

Q. If you have a tree that is heavily or badly infected with mildew, will be Elgetol show more marks or signs where it cleans up the mildew than it would on a tree that doesn't have so much?

A. It will, because I think you will find where the mildew is bad you're going to have plenty of

(Testimony of William S. Regan.)

injured foliage, where it typically goes into the infected area.

Q. Now, so far as Winesaps on the Stahler farm are concerned, did you discuss the matter of using Elgetol to control [263] mildew on the Winesaps with Mr. Stahler?

A. Only that there was a slight amount of mildew just adjoining the Jonathans, apparently infection coming over from the Jonathans; there wasn't much, but there was some, but it was primarily the thought of bloom thinning.

Q. And what did you tell him about that?

A. If I felt certain about the material I would have told him to go ahead and spray the whole place, but these are two short rows, and heavy bloom, I thought, and I thought that it would be a pretty fair time to check it, see what it would do.

Q. Was there any mildew in the Romes on the Keck ranch?

A. Yes, the Romes were pretty badly infected, too.

Q. Did you and Mr. Stahler discuss Romes, the use of Elgetol on them? A. Yes.

Q. What was said about them?

A. Just about the same as the Jonathans; they're a later blooming variety.

Q. Did you discuss the matter of spraying with Elgetol with Mr. Stahler after the pink had been applied in 1945?

A. Well, I think we did practically all our talking about what would be done before the pink time.

(Testimony of William S. Regan.)

Q. Now, so far as a new product is concerned, I suppose in [264] your years you've seen certain new things come on the market, or not?

A. Almost every year something new appears, and right now there are plenty coming out.

Q. What is the general practice or custom where a new product appears, such as Elgetol, as to whether after it has been used by some growers, whether it goes into a test stage, or whether its use follows?

A. Well, it's customary, of course, to make experiments with any new materials.

Q. And as to Elgetol, did you make any experiments, other than on the growers' places, in '44?

A. No.

Q. Did you ever discuss the matter of using Elgetol with any of the extension men in the county, such as Mr. Luce?

A. I believe I have discussed the use in the field with them sometime, but I can't say for certain.

Q. I mean in 1945, or prior thereto?

A. No, I don't believe I ever talked it over with Mr. Luce.

Q. Had you discussed it with any of the other gentlemen, whether they were recommending it?

A. No, I didn't discuss it with any of the other men.

Q. Are there other sprays commonly used, known as DN, or Elgetol, or not? Are there any sprays that are DN besides Elgetol, that you know of?

A. There's an Elgetol spray, Dinitro Creosol;

(Testimony of William S. Regan.)

there's DN 111, used as a summer spray, which is also causing injury.

Q. Is lime and sulphur what you call a DN?

A. I didn't get that.

Q. Is lime and sulphur, would you call that a DN?

A. No.

Q. Did you talk with Mr. Stahler during the time the spray was put on the calyx at all, do you recall?

A. I happened to be on the orchard one day when they were spraying the Romes, and I think at a later date, either they were just starting, or I can't recall, maybe they had finished spraying, but it seemed to me that they were spraying in the bloom period, that is, nearer the bloom period than the typical calyx period; there was quite a bit of bloom still on the trees.

Q. That would be before the calyx?

A. That would be before the calyx, the true calyx period.

Q. Do you know whether that was being applied as a thinner, or as a mildew control?

A. Well, on the Winesaps, the thought was bloom thinning, but on the Romes, mildew.

Q. Now, as to experimenting, that you mentioned, was there any particular reason that you didn't experiment as much in those years as other years? [266]

A. We couldn't do it.

Q. Why?

A. Didn't have any help.

Q. Did you tell Mr. Emerson or Mr. Stahler at

(Testimony of William S. Regan.)

any time that your company had experimented or made any tests with Elgetol "30" as to using it for mildew or thinning? A. No.

Mr. McKelvy: You may cross-examine.

The Court: I think this would be a good place to adjourn. The court will adjourn until tomorrow morning at ten o'clock.

(Whereupon, a recess was taken in this cause until Wednesday, January 29, 1947, at ten o'clock a.m.) [267]

Yakima, Washington, January 29, 1947
10 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

Direct Examination of William S. Regan
(Continued)

By Mr. McKelvy:

Mr. McKelvy: I just have one or two questions I would like to ask.

Q. Doctor, I believe I forgot to ask you yesterday how your concern receives the Elgetol, or Elgetol "30"; how is it shipped to you?

A. In one-gallon and five-gallon cans.

Q. Are these sealed cans, or not?

A. The one-gallon cans are sealed; the five-gallon have a—well, it isn't sealed, it can be pried off.

Q. Has the California Spray-Chemical Company at any time changed the contents of the Elgetol?

A. No.

(Testimony of William S. Regan.)

Q. You do not have anything to do at all with its ingredients? A. No.

Q. And California Spray-Chemical Company does not manufacture it? A. No. [270]

Q. Now, Doctor, there was some talk about experimentation. I will ask you whether or not it is normal practice in this vicinity to experiment with a product for three to five years before it is used by the grower?

A. There are some materials that are going into use with not over one year of experimentation.

Q. Could you tell the jury what materials, by way of example?

A. Well, the new material, D.D.T., has gone into use and being recommended by certain states after not over a year of experimentation.

Q. Now, when you mention experimentation, do you mean growers' use, or not?

A. Partly grower use, but especially experimentations by the state and federal workers.

Q. Any other product that you could think of by way of example?

A. A new material known as hexaethyl tetraphosphate is going into use with only a year's experimentation.

Mr. Hawkins: Does that have a trade name?

A. It does. It has several trade names, depending upon the manufacturer.

Mr. Hawkins: Can you give us one?

A. Killex.

Q. What other trade name?

(Testimony of William S. Regan.)

A. Dapalone; those are two. [271]

Q. All the same thing, under different manufacturers?
A. Yes, so far as we know.

Q. And do you know, Doctor, whether or not states have recommended this product?

A. I know that there are states that have recommended it. I know in the case of D.D.T., Idaho recommended it very strongly; I'm referring now to D.D.T. after a year of experimentation, and West Virginia did likewise, and after two years, many states and even federal authorities are recommending D.D.T.

Q. Do you know of any damage, or is there danger of injury, by the use of D.D.T.?

A. There is very grave danger under certain conditions and certain types of use.

Q. Has there been any damage from D.D.T. in the use in the valley, that you know of?

A. I didn't quite get that.

Q. Do you know of any injury that has been suffered here in the valley from the use of this D.D.T.

A. I know that horses have been killed from mis-use of D.D.T.

Mr. Hawkins: What did you say?

A. Horses have been killed.

Q. As to orchards, do you know whether or not there is any injury occurred here in the valley?

A. Reports have indicated injury to orchard trees from D.D.T. [272]

Q. Doctor, assume that you spray when the pet-

(Testimony of William S. Regan.)

als, fifty per cent of them, have fallen; would that be a bloom spray or a calyx spray?

A. It would be a calyx spray, in the interpretation of the calyx spray.

Q. And where sprays are applied, we'll say, in the bloom, late bloom, how much time is there there without getting into the so-called calyx, ordinarily?

A. It will vary with the weather conditions. If the weather is warm it may be only a few days.

Q. I will ask you whether, in your experience and observation, whether or not it is customary to spray through the bloom and the calyx before the grower has completed his spraying in the orchard?

A. If the grower has considerable acreage he may start in the bloom period and spray right through.

Q. Now, in your opinion, Doctor, would the application of Elgetol in the bloom, late bloom, or early calyx, make any difference so far as the chance of injury to the foliage is concerned?

A. I see no difference.

Q. Would it make any difference as to whether or not there would be danger of over-thinning?

A. Yes, there could be a considerable danger, depending upon weather conditions, the pollination, vigor of the [273] trees, whether you've over-thinned or not.

Q. Well, suppose you applied it to the calyx. Would there be a danger then of over-thinning?

A. There should be less danger then, because the trees have set.

(Testimony of William S. Regan.)

Q. So that the danger you refer to from the bloom into the calyx applies to the matter of thinning, am I right?

A. Kindly repeat that.

Q. Applies to the matter of whether or not you get too much thinning; I mean the question of when you put it on might make some difference?

A. Yes, it should.

Q. Now, could it make any difference as to the chance of foliage injury? A. I can't see that.

Q. Why do you say that?

A. The foliage—there is just a matter of a few days; I can't see there would be any difference as far as foliage is concerned.

Q. Does the application of Elgetol have different effects depending on whether or not the tree is badly infected with mildew, or less, we'll say?

A. A tree badly infected with mildew is in a weakened condition.

Q. And what happens if you apply Elgetol?

A. Well, there will be more foliage injury, due to the infected area and the weaker condition of the foliage, under infection of that type.

Q. I will ask you whether or not that is true in the use of other sprays than Elgetol?

A. It is.

Q. Have you checked at all, Doctor, as to the amount of experimentation and whether or not states are recommending the D.D.T., and I've forgotten the name of the other, Killex; I believe you

(Testimony of William S. Regan.)

said; have you checked any authorities on that, publications? A. Yes, I have.

Q. And what publications did you check?

A. Well, the information is in the AIF news, and gives a summary of the reports from the different states as to what they are going to recommend this coming year, for many insects.

Q. And you checked these over last night?

A. I did.

Mr. McKelvy: You may cross-examine.

Cross-Examination

By Mr. Hawkins:

Q. How long has D.D.T. been on the market, Doctor? A. Commercially, about two years.

Q. About two years; and how long has it been in use by state and federal authorities? [275]

A. About the same length of time.

Q. Wasn't it used by the Army during the war?

A. Yes.

Q. And for how long?

A. Well, I think it started, probably, around '42.

Q. D.D.T. is an insecticide, is it not?

A. Yes.

Q. It is not a fungicide? A. No.

Q. Therefore, it is unlike Elgetol?

A. As far as being a fungicide it is unlike Elgetol, yes.

Q. Yes, and this Killex, or Vapatol, that you spoke of, what is that used for?

(Testimony of William S. Regan.)

A. It is used for the control of aphids, mites, thrips, and other insects.

Q. And it is an insecticide, is that right?

A. That's right.

Q. And it is not commonly used as a fungicide, is it?

A. No, it is not known at present whether it has any fungicidal value; it may prove to have.

Q. And how old a material is that?

A. How old?

Q. Yes.

A. It was developed in Germany during the war to replace nicotine, and after our forces took over they discovered [276] this formula; I understand that our government has control of it, and is getting it out to manufacturers under some sort of a licensing program.

Q. And the German scientists had experimented with it during the war?

A. I assume that they had, yes.

Q. Yes, so that these states that you spoke of that are coming out and recommending its use now, when they do that, they're basing their judgment on more than just last year's use, is that right?

A. Yes, just as we did in the case of the Elgetol, from its use in the East.

Q. Well, we'll come to that in a few moments. Doctor, in how many states does your company do business?

Mr. McKelvy: Objected to as immaterial.

The Court: Well, I'll overrule the objection.

(Testimony of William S. Regan.)

A. We do business on the Pacific Coast and on the Eastern Atlantic Seaboard.

Q. Your company is a nation-wide company, is that right? A. That's right.

Q. And it is engaged in the business of selling spray materials? A. Yes.

Q. Of all kinds? A. That's right. [277]

Q. One of the principal items that you handle is oil, is that not right, Doctor?

A. It is, yes.

Q. Now, your company is a wholly owned subsidiary of the Standard Oil Company, is it not?

Mr. McKelvy: I object to that as wholly improper cross-examination, incompetent, irrelevant, and immaterial.

The Court: I'll sustain the objection.

Mr. Hawkins: Your Honor, I would like to make an offer of proof. If counsel wants it in the absence of the jury that's perfectly all right.

(Whereupon, the following proceedings were had without the presence of the jury:)

Mr. Hawkins: Your Honor, I wish to show that the fact, which I understand to be a fact, that the defendant corporation is a wholly owned subsidiary of the Standard Oil Company; the manufacturer of this Elgetol is the Standard Chemicals Company of Hoboken, New Jersey, and I want to interrogate this witness as to whether or not the manufacturer is not also a wholly owned subsidiary of the Standard Oil Company. I call your Honor's attention,

(Testimony of William S. Regan.)

for instance, to this tin in which Elgetol is furnished, which is put out by the Standard Chemicals Company of Hoboken, New Jersey; quite obviously the characteristic pattern of the Standard Oil Company. [278]

Now, I don't know what the Doctor is going to say. Counsel some time ago assured me there was no connection between the two, but I would like to have that on oath. Now, it has this bearing on the case: One of the principal items that this company sells is oil, as the witness just testified, and that, of course, is a side line of the Standard Oil Company, the selling of oil as a spray. Now, it comes to this point; the testimony that's already been introduced shows that Elgetol can be followed by an oil spray, whereas the spray of lime and sulphur cannot be followed with an oil spray for a period of sixty to ninety days, and I expect to show by this background that Dr. Regan and the California Spray-Chemical Company were keenly interested in finding a material that would permit the further sale of oil, and that they pushed this product, in fact, over-pushed it, because they felt that at last they had found something which would permit the increased sale of oil, and that's the picture I want to develop, and I think with that background the questions I am about to ask are proper.

Mr. McKelvy: We object to the offer for the reason it is entirely outside the issues as framed by the pleadings. There is no claim here that the defendant was the manufacturer, either directly or

(Testimony of William S. Regan.)

indirectly, and I think the pleadings still are supposed to be the [279] guiding thing of the issues in the case. Second, the obvious idea is to explore, from counsel's own statement. His exploration so far presumably has done him some good, bringing the Standard Oil into the case. Having admitted he is exploring, it is certainly incompetent, irrelevant and immaterial to the issues in the case. There is no claim that we had any connection whatsoever with the manufacturer.

The Court: I will sustain the objection. I think it is a little late to change the theory, if that's the purpose.

Mr. Hawkins: It is not a question of changing the theory of the case. This witness has testified on direct examination that it was the result of grower pressure that compelled them to bring in this Elgetol. That's the inference they have attempted to leave with the jury, and I'm entitled to show they had a very definite interest in selling oil, and they had a keen interest in the promotion of it, and to show they are all tied in with the Standard Oil.

The Court: If you want to show a motive in pushing sale, I have permitted you to do that. You asked and it was answered that they sell oil. I wouldn't think it would be necessary to bring in the relationship of the Standard Oil and all its subsidiaries to show they [280] sell oil and want to sell more oil.

Mr. McKelvy: I have a motion for mistrial, the

(Testimony of William S. Regan.)

question being asked; counsel asked the same question in the other trial, in front of the jury. I suppose no matter how many trials there are the same question will be asked, and I think I should have a ruling on the mistrial at this time.

The Court: All right, the motion will be denied.

Mr. McKelvy: To clear the deck, I notice in one case, the Keck case pleaded the label. That was early in the case. I move at this time to strike that defense. It isn't in that case and shouldn't be in this one.

The Court: I thought it was in both of them. You have an amended answer, I think, that brings it into the other one.

Mr. McKelvy: In any event, if they are, I'll move to strike it out of each one. I don't think it is proper.

The Court: It runs into my mind I noticed you had that defense in one and not in the other, but I think I found it in the amended pleading.

Mr. McKelvy: I'll move at this time to strike it.

The Court: The motion will be granted, as to each case in which it appears. I think that perhaps to clarify the record, the clerk has suggested that some [281] time before the conclusion of the trial you renew your motion, and apply it to the particular paragraphs of the particular affirmative defenses, so there can't be any question as to what we're doing.

Mr. McKelvy: Very well, I'll do that.

The Court: Bring in the jury.

(Testimony of William S. Regan.)

(Whereupon, the following proceedings were had within the presence of the jury:)

The Court: I might just say briefly at this time, gentlemen of the jury, that it might seem childish to you to keep going out and back all the time, but that's a thing that is necessary in a case of this kind. Trials have to be conducted according to very well established rules of evidence. If we didn't, you could sit here for weeks. We have to limit the issues according to the rules that apply here. We have you go out when we discuss points of law because it is nothing that concerns you, and we want to keep your minds free from things that are not going in, that we talk about here as to whether they should go in or not. You may proceed.

Cross-Examination of William S. Regan
(Continued)

Q. Your company, one of the principal sprays it sells is an oil spray, isn't that right, Doctor?

A. Yes.

Q. When you spray for mildew with lime and sulphur in the [282] pink and in the calyx, it is sixty to ninety days before you can follow up with an oil spray, isn't that right? A. No.

Q. How soon can you follow up with an oil spray? A. Thirty days.

Q. I believe it was testified here the other day that recommendations were from thirty to ninety days?

(Testimony of William S. Regan.)

A. Thirty days after a pink or calyx, and sixty days or more after a dormant lime-sulphur.

Q. After a dormant lime-sulphur application; now, I believe you told the growers in 1945 that if they sprayed their trees for mildew with Elgetol they could follow up with oil in their first cover, isn't that right?

A. In a period of ten days.

Q. In a period of ten days. That's the reason why you were interested in Elgetol, isn't it, Doctor?

A. It was also the reason why they were interested in Elgetol.

Q. Yes; but you were selling oil sprays?

A. Among many other materials, yes.

Q. And you're interested in doing whatever is necessary to increase the sale of oil sprays, isn't that right? A. No, I am not.

Q. You're engaged by the company to assist in the sale of their products, aren't you? [283]

A. No, I am not. I am engaged to put out reliable information to our users.

Q. And you do that orally?

A. Sometimes.

Q. And through the Ortho News?

A. Yes.

Q. And over the telephone? I suppose you get many calls a day, don't you?

A. That's right.

Q. Particularly in the spring when the spray program starts?

A. And all through the summer.

(Testimony of William S. Regan.)

Q. And all through the summer; and you talk to a good many growers throughout the season, do you not? A. I do.

Q. In fact, would you care to estimate that you talk to about half the growers in the valley?

A. No, I don't, any such number as that.

Q. Not that number, but a pretty substantial number every season?

A. Well, a fair number.

Q. To the customers of your company?

A. Both customers and those who are seeking information, who may not be our customers.

Q. Yes. You're also engaged in working out spray programs, are you not, for various of your customers? [284] A. That's right.

Q. And you go out on the orchard with them and look the orchards over? A. Sometimes.

Q. And you work out a program for them to follow? A. Uh huh.

Q. And you give them formulas to use, isn't that right? A. Yes.

Q. And the grower has learned to look to you for advice and counsel in these matters, isn't that right, Doctor? A. I believe they do.

Q. And that was one of the reasons you were hired here, as I understand your testimony, or employed here, was to occupy that position with respect to the growers, isn't that right?

A. Primarily I was brought in to carry on research work.

(Testimony of William S. Regan.)

Q. And ultimately to assist the company in the sale of its products?

A. No—indirectly, yes.

Q. Indirectly, yes? A. Yes.

Q. Well, you were pretty enthusiastic about Elgetol, then, yourself, in 1945?

Mr. McKelvy: Object to the question as immaterial.

The Court: Well, I'll overrule the objection.

(Whereupon, the reporter read the last previous question.)

A. I was enthusiastic to the extent that growers who had used it were well pleased, almost invariably, and many growers were interested in any material that might make it possible for them to improve their codling moth control by using the most effective materials.

Q. Well, you thought you had found something that would enable the further sale of oil, isn't that right? A. That didn't follow at all.

Q. That wasn't in your mind?

A. No, it was not.

Q. You ordered the Elgetol into the Yakima Valley, didn't you?

A. I didn't get that question.

Q. You ordered the Elgetol into the Yakima Valley?

A. We ordered it at the request of growers who wanted to use the material.

Q. I see; how much Elgetol did you order, if you remember?

(Testimony of William S. Regan.)

A. I don't remember. It might have gone into several hundred gallons, or a few thousand gallons.

Q. You tried to get all you could that spring, didn't you?

A. No; we got whatever we thought the growers would require.

Q. Wasn't Elgetol pretty hard to get in the spring of '45?

A. Not according to my recollection. [286]

Q. Didn't you tell Mr. Emerson in that first telephone conversation he had with you that he had better buy it when and as he could, because it was hard to get?

A. I have no recollection whatever of talking to Mr. Emerson over the 'phone.

Q. I see; and you may have said that to him, however?

A. Well, I don't recall it.

Q. You don't recall it? A. No.

Q. Did you ever analyze Elgetol "30"?

A. We've had it analyzed.

Q. Did you have the '45 product analyzed?

A. I believe so.

Q. And the '44 product analyzed?

A. I think so.

Q. Did you find any difference in the two?

A. No.

Mr. McKelvy: Objected to as not proper cross-examination, outside the issues of the case.

The Court: Well, he's answered. I'll let it stand.

(Testimony of William S. Regan.)

Cross-Examination

(Continued)

Q. And why did you have it analyzed?

Mr. McKelvy: Make the same objection.

The Court: Overruled. [287]

A. We often have our regular products analyzed, to see if they are up to standard.

Q. Now, as a matter of fact, in this case, Doctor, you had those two years analyzed to find out whether that was the reason it didn't work in '45?

A. We might have had 1946 analyzed too.

Q. I'm asking you about 1944 and 1945.

A. Kindly repeat your question.

Q. I say, you had those analyses made for the purpose of finding out if that was the reason all this trouble came up in '45?

A. We had them analyzed to see what the chemical composition of the material was, and whether it was up to the standard indicated on the container.

Q. There was quite a bit of damage done by Elgetol in 1945, wasn't there, Doctor?

Mr. McKelvy: I object—well——

A. Yes.

Q. And you had the 1944 and 1945 analyzed to find out if there was any difference in the two, didn't you?

A. I don't recall that was the reason. I think it was analyzed to find out whether the material was up to the formula indicated on the container. We often do that.

(Testimony of William S. Regan.)

Q. To find out if in fact this was other and different than the formula on the tin, if that was the reason it caused [288] you trouble in 1945?

A. That isn't what I stated. I stated it was analyzed to see whether the formula was up to the formula on the container.

Q. It wasn't for the purpose of fixing the blame?

The Court: I'll sustain an objection to that. He's answered that three times.

Q. Now, the analysis that you had made of the '44 product was in 1945 or 1946, was it not?

A. I believe it was in 1944.

Q. You had the 1944 product analyzed in the year 1944? A. I think so.

Q. I see; and you found no difference?

A. And the sample as analyzed in 1945 showed the identical composition.

Q. Identical composition; now, did you ever recommend to anyone that they use Elgetol as a mildew control?

A. Our position on the use of Elgetol for mildew control was based entirely as a suggestive material, on the experience of growers in '44.

Q. And that is true in all cases, I take it?

A. I think so.

Q. Now, referring to the April 17, 1945, issue of the Ortho News, this is what you said then: "Mildew has been severe during the past several years on Jonathans and some other [289] varieties of apples, with some cases of severe injury to D'Anjou and Bartlett pears and to some varieties

(Testimony of William S. Regan.)

of peaches. Growers have the choice of the standard treatment with liquid Lime-Sulfur (2 gallons or more in 100) in the "pink," with follow-up sprays of wettable Sulfur for calyx or later sprays, if necessary. To some, Sulfur would be objectionable because it delays the use of Summer Oil in the spray schedule. The grower also has a choice of Elgetol which has shown good control of Mildew and can be followed by Summer Oil in the usual ten day interval. Suggested dosage—(1) Elgetol $1\frac{1}{2}$ pints in 100 gallons of water in the "pink," when buds are separated in the clusters and before the bloom opens, and (2) Elgetol $\frac{1}{2}$ pint in 100 with 3 pounds of Lead Arsenate, in the calyx spray.'

Now, isn't it a fact that you told the growers that they had the choice of either the standard method or the use of Elgetol as a control?

A. I think that is stated there.

Q. Did you ever tell the growers that they were acting at their own peril when they used this product?

A. I think that any grower knew that the material had been used—

Q. Just a moment, I'd like you to answer my question. Did you tell any grower, or Mr. Emerson, Mr. Keck or Mr. [290] Stahler, that they were using this material at their own peril?

A. I told Mr. Stahler that the material was new, and he knew that it was new, and as I mentioned before, I had no conversation with Mr. Emerson until he had used it during the previous year,

(Testimony of William S. Regan.)

unknown to me, and in the pink of '45 before I knew he had used it.

Q. That's your answer to my question?

A. Yes.

Q. In other words, you did not tell Mr. Emerson that he was acting at his own peril in using it?

A. I had no occasion to contact him to tell him that.

Q. And you did not tell Mr. Stahler that?

A. I told Mr. Stahler——

Q. You just testified you told him you knew it was a new material.

A. He knew it was a new material.

Q. But you did not tell him he was acting at his own peril in using it, did you?

A. I don't use that word "peril."

Q. Do you ever say that a spray is a good spray or a bad spray?

A. Well, we usually refer to spray materials with reservations. After a good many years of experience we know that almost any spray material can cause injury under [291] certain conditions.

Q. Handing you plaintiffs' Identification G, is that your handwriting, sir?

A. I don't think that that was identified.

Q. Well, that's called plaintiffs' Identification G.

The Court: Well, you may answer the question.

Mr. McKelvy: Just answer the question, Doctor.

A. This is my handwriting, yes.

Q. Did you leave that for Mr. Stahler in the year 1945?

A. As I recall, I did.

(Testimony of William S. Regan.)

Mr. Hawkins: I will again renew my offer.

Mr. McKelvy: I object to the offer for the reason that it is not tied up at all with the issues in this case.

The Court: Let me see that again.

Mr. McKelvy: It does not refer to anything in this case.

Mr. Hawkins: The man says he always——

A. Would it be in order for me to——

The Court: Just a moment.

Mr. McKelvy: Wait till the court reads it.

The Court: I'll sustain the objection.

Mr. Hawkins: Your Honor, the witness has testified that he never makes any comment about a spray except he makes reservations, and this little note here [292] clearly contradicts that statement, and for that purpose it is admissible.

The Court: I have sustained the objection. If it is impeachment, it is collateral.

Cross-Examination

(Continued)

Q. Do the remarks that you made in that plaintiffs' Identification G refer to Elgetol, or some other spray?

A. It did not refer to Elgetol. It referred to a material that we do not sell, and that Mr. Stahler had used on his place, unknown to me.

Q. I see. Now, Doctor, when you give this advice to the growers orally and through the Ortho News, you anticipate that the growers will rely on what you say there? A. Not altogether.

(Testimony of William S. Regan.)

Q. Well, you put it out for the purpose of guiding them, don't you?

A. I put it out for the purpose of giving them the best information available at that time.

Q. You do not put it out for the purpose of assisting them, then, is that it?

A. It is for the purpose of instructing them to our best knowledge, in the use of materials.

Q. All right, then; if you put it out for the purpose of instructing them in the best use of the materials to your knowledge, you expect them to follow those instructions, [293] don't you?

Mr. McKelvy: I object to that as argumentative and repetitious.

The Court: Overruled.

Cross-Examination

(Continued)

Q. You expect them to follow those instructions, don't you, Doctor?

A. Not altogether.

Q. Well, do you expect them to disregard those instructions?

A. I expect them to use judgment.

Q. Well, now, when you say 1½ pints of Elgetol per one hundred gallons of water, you expect them to follow that formula, don't you?

A. I expect them if that suits their particular case that would be the dosage, yes.

Q. You don't expect them to use something else when you tell them 1½ to 100, do you?

Mr. McKelvy: Object to it as argumentative.

(Testimony of William S. Regan.)

The Court: I think I'll sustain the objection. It is obvious the instructions are put out to be followed.

Mr. Hawkins: I think it is obvious, too.

The Court: The jury will disregard comments either of court or counsel unless it is in evidence.

Cross-Examination

(Continued)

Q. Now, when you tell the grower to apply the spray in the pink, at what stage do you expect him to apply the spray?

A. The application of a pink spray can mean anything from the very first showing of the pink until the bloom opens.

Q. Until the bloom opens? A. Yes.

Q. And that's what you call the pink?

A. There are various stages of pink.

Q. Yes; and when you instruct a grower to apply the Elgetol in the calyx, at what stage of apple do you expect them to apply it?

A. May I use another word than instruct? I don't instruct the growers.

Q. Oh, I was just using the word that you used yourself a few minutes ago.

A. Well, the calyx spray is anywhere, this is what I consider the official calyx period, any time from fifty per cent of the blossoms fallen to seventy five per cent.

Q. What about the stage of development of the bud?

A. Stage in the development of the buds?

Q. Yes.

(Testimony of William S. Regan.)

A. Well, that is the stage, fifty to seventy five per cent of the petals fallen.

Q. Well, I've heard some testimony here that the calyx is the stage when the little apple is just formed, but [295] before the end closes up.

A. Well, the calyx period is an extended period too, depending upon weather, but as far as the spray application is concerned, they usually consider the period fifty to seventy five per cent of the petals fallen as the time to start the calyx spray.

Q. That is when the flesh is formed?

A. The what?

Q. The flesh?

A. Well, there's a little bump there.

Q. That hasn't yet closed up. That's the same as when fifty to seventy five per cent of the petals have fallen?

A. Of course, the bulb sizes up, probably, in that period.

Q. In other words, your definition of calyx is about the same as Mr. Reeves', the man from Wenatchee?

A. I think that's about the standard calyx period for the start of the calyx spray.

Q. And when you give instructions to apply a spray in the calyx you expect a grower to apply it at that stage, is that right?

A. Well, we don't as a general rule tell the grower just when to start his calyx spray. It is a well-known period, and the average grower would know when to start.

(Testimony of William S. Regan.)

Q. And that's when you expect him to start it when you tell him to apply it in the calyx spray?

A. I say, that's the expectation, that that's the time he would start it.

Q. You don't recall this telephone conversation that Mr. Emerson testified to as occurring about the second of April, 1945?

Mr. McKelvy: That's repetitious.

The Court: Sustain the objection.

Q. I wonder if you recall that part of the conversation relating to a dormant spray?

A. I have no recollection whatever.

Q. You don't recall his asking you whether Elgetol could be used as a dormant spray?

Mr. McKelvy: I object to that.

The Court: Does that refer to the telephone conversation?

Mr. Hawkins: Yes, it does.

The Court: He said he didn't remember any telephone conversation. I'll sustain the objection. If he didn't remember all of it he couldn't remember part of it.

Cross-Examination

(Continued)

Q. You receive a good many calls a day, do you not, Doctor?

A. It varies a great deal, from none at all to several.

Q. And because of the number of them it might be possible for you to have a conversation and not be able to remember it a couple of years later? [297]

A. Oh, that's a possibility.

(Testimony of William S. Regan.)

Q. Yes. Now, you say that the first time that you recall of seeing Mr. Emerson was when he came to your office and wanted you to come out to his orchards?

A. No, there was a telephone call that came into the office, that I didn't answer, and he requested that I come to his orchard.

Q. I see; and this was about the 5th of May, wasn't it?

A. I don't recall the date, but I recall the period of time in the orchard. He had just finished his pink spray.

Q. Yes. It was between the pink and the calyx stage? A. Yes.

Q. And who was with you when you went out there? A. Tom Strand.

Q. And who is he?

A. Tom Strand is in the research department of the California Spray-Chemical Corporation, located in California.

Q. And didn't Mr. Emerson complain to you of the damage that was apparent in his orchard as a result of the use of Elgetol?

A. He mentioned that there was some foliage injury beyond the normal expectation, on the mildewed tips, in the Gromore orchard, and requested that we meet him there the next day, which we did.

Q. You saw no evidence of burn at the Tieton orchard? [298]

A. I saw none other than possibly a little tip.

Q. Did you see any evidence of burn at the Gromore orchard?

(Testimony of William S. Regan.)

A. There was some indication on yellow foliage that there was some burn; other than that, in the mildew area.

Q. Now, as I recall your direct testimony, you stated that the general conversation was just about Elgetol as a thinner?

A. Well, other than this reference to the yellow foliage and the effect on that, yes.

Q. The principal part of your conversation according to your present recollection was Elgetol as a thinner? A. That's right.

Q. Mr. Emerson wanted to find out about that?

A. Yes.

Q. And there was very little damage at that time?

A. I would consider it not commercial damage.

Q. Not commercial damage? A. Yes.

Q. Then you did tell him that he still had a good crop in prospect?

A. It appeared to be; at least he said that he expected a good bloom coming up.

Q. Well, you could see the pink at that time, couldn't you? A. Yes.

Q. And didn't Mr. Emerson express alarm about using Elgetol [299] again in the calyx?

A. My recollection was that there was not any discussion of calyx. Mr. Emerson was very much concerned about a bloom thinning spray; that is, he was interested.

Q. And you think he called you out there to his

(Testimony of William S. Regan.)

Tieton place and to his Gromore place just to talk about the possible use of Elgetol as a thinner?

A. That's right.

Q. I see.

A. Other than the fact that there was a little burn on the yellow foliage that I referred to.

Q. Well, wouldn't the fact that he called you out there to look at it indicate he was worried about it?

A. I think there was a little more than the normal condition, but he didn't seem to be seriously concerned about it.

Q. Didn't you tell him to go ahead and use the Elgetol in the calyx? A. No.

Q. You have no recollection of that, Doctor?

A. No, I haven't.

Q. Did you ever tell any grower to use Elgetol in the calyx?

A. The discussion in this particular case was on bloom thinning. Why would he be using a mildew spray on Delicious and Winesaps, which are not normally susceptible [300] to mildew?

Q. They are susceptible at certain——

A. They are not. Very, very slightly.

Q. ——at certain times, under certain conditions, are they not?

A. No, they're considered non-susceptible varieties.

Q. Didn't he check with you a second time before he put on the calyx spray, and ask you again if you were sure it was the thing to use?

(Testimony of William S. Regan.)

The Court: Answer, instead of shaking your head.

A. No.

Q. Your answer is no; and is it not a fact that you told him that "we have used it back east, we have used it here, and in Wenatchee, and if it were harmful, we would know it now, and man, we wouldn't be recommending it if we didn't know it was safe"?

A. I made no such statement whatever.

Q. Now, with reference to Mr. Stahler, he invited you out to his place?

A. Mr. Stahler I believe at the outset invited me to come to his orchard.

Q. For the purpose of obtaining some information from you? A. That's right.

Q. You told him to use Elgetol in the pink, did you not? A. I didn't tell him to.

Q. On the Jons? [301]

A. No, I didn't tell him to.

Q. You told him to use it in the calyx on the Jons? A. No, I did not tell him to.

Q. What was this Exhibit F?

A. That was a discussion between us, and it was decided——

Q. What about Plaintiffs' Exhibit F, what is that?

A. It's just as I stated yesterday, that we talked it over, and he had his choice between using lime and sulphur and Elgetol, which he knew about, it was new, and he didn't want to use lime and sul-

(Testimony of William S. Regan.)

phur because it would interfere with his codling moth program, and he decided to use Elgetol, based on some observations that he made the year before.

Q. And not on your advice at all, Doctor?

A. Well, it was simply a discussion.

Q. He just drug it out of you, Doctor?

A. No, he didn't "drug" it out of me, no.

Q. All right. That is the formula that you told him to use in the calyx spray?

A. That is the formula that we discussed, and he asked me if I would write it down. I did.

Q. And that is your handwriting?

A. That's my handwriting.

Q. All right, Doctor.

(Whereupon, a one gallon tin can was marked Plaintiffs' Exhibit "J" for identification.) [302]

The Clerk: I omit "I" and use "J". It's too hard to tell the difference between them.

Cross-Examination

(Continued)

Q. This is a tin, plaintiffs' Identification J, that Elgetol comes in, one gallon size, is it not?

A. Uh huh, yes.

Q. That was the tin that was used in 1945?

A. I think that was the tin used in 1944.

Q. Any difference between the 1944 and 1945?

A. The difference in the can, the 1945 had a tight lid; that is, it wasn't the type that you could pry off.

Q. I see; otherwise it was the same?

A. Yes.

(Testimony of William S. Regan.)

Q. And I notice that it says a dormant spray for—excuse me—I will offer this in evidence.

Mr. McKelvy: We will object to it as irrelevant and immaterial. It is not at issue in this case.

The Court: I'll overrule the objection, and admit it.

(Whereupon, Plaintiffs' Exhibit "J" for identification was admitted in evidence.)

Cross-Examination

(Continued)

Q. This tin indicates that the spray is intended as a dormant spray, does it not?

A. It is stated on the container. [303]

Q. Then it also says:

"Elgetol 30, a material for dormant spraying of deciduous fruit and ornamental trees, contains no oils. Elgetol 30 should be applied during the dormant period except where late dormant is recommended."

Did that indicate anything to you, Doctor?

A. Well, it indicated to me that we have some experimenters around the country who are finding new uses for old products.

Q. And that is to say, it put you on your guard, and you thought you had better look around a bit before you sold it as a mildew control, or after the dormant period?

A. No, that wasn't indicated.

(Testimony of William S. Regan.)

Q. That wouldn't be indicated to you by that language on the tin?

A. Not after the recommendations in the east.

Q. Now, by the way, in the east the material was used as a thinner, was it not?

A. Yes, because mildew is not prevalent to any extent back there.

Q. Yes. Now, then, it also says "Provided that Elgetol 30 spray has had the opportunity to dry, rains following application do not materially reduce its effectiveness." Did that mean anything to you?

A. Exactly what it says.

Q. Did you tell any of the growers to watch out for hot [304] weather?

A. We had no knowledge at that time that weather was a factor.

Q. Did you tell any of them to watch out for cool or wet weather?

A. No, we had no knowledge of the effect of weather.

Q. And in the case of lime and sulphur you do have to watch out for hot weather, don't you?

A. For the summer sprays, hot weather is a factor that might cause extra injury.

Q. Well, oftentimes the calyx spray comes along at the end of May, doesn't it, just before the first of June?

A. Yes, it might even come in late April.

Q. And if your calyx spray comes at the end of May you might run into some pretty warm weather, mightn't you?

A. You might.

(Testimony of William S. Regan.)

Q. Well, isn't it a fact that with lime and sulphur, that lime and sulphur may burn if the weather becomes warm immediately after its application?

A. It may.

Q. On the other hand, with lime and sulphur, if the weather is cool there is little danger of burn?

A. Yes, and also little danger of doing any good.

Q. Now, I take it with Elgetol apparently it is just the reverse, isn't it, that if it is wet and cold after its [305] application, then you do have damage?

A. That proved to be the case.

Q. Yes. Now, as I understand it, your recommendations in the use of Elgetol were based on the results, primarily, obtained by growers such as we had here yesterday?

A. Technically, those were suggested suggestions, not recommendations; suggestions.

Q. Suggested suggestions?

A. No—they were suggestions.

Q. But I mean you, whatever it was you said in 1945, whether we call it a recommendation or a warranty or a suggestion——

Mr. McKelvy: You don't claim it is a warranty, do you?

Mr. Hawkins: Well, whatever you want to call it.

Mr. McKelvy: Well, let's have the question.

Q. Whatever you call it, that was based, in your mind, on the results obtained by people such as were here testifying yesterday on your behalf?

A. That's right.

(Testimony of William S. Regan.)

Q. You know that work done in one part of the country has to be checked in this locality before you can really tell what it is going to do?

A. Well, I know that it might be wise to do that, although it isn't always done, even among the experimenters.

Q. It would be wise to do that? [306]

A. Yes.

Q. Your conditions are different back east, aren't they, in a great many respects?

A. They are somewhat different.

Q. For instance, as you just testified, they're not bothered with mildew back there? A. Yes.

Q. Whereas we have it back here.

A. They had scab back there, and we don't have it here.

Q. And mildew tends to weaken the tree, does it not? A. Yes.

Q. One further thing, Doctor; I notice in your Ortho News you warn the growers not to combine Elgetol with oil, is that right?

A. The statement is there to that effect.

Q. Does that still hold true? A. Yes.

Q. I notice on the tin, however, that it says the spray may be combined with oil.

A. Well, that's the dormant application.

Q. Oh, I see, that's for the dormant application?

A. Yes.

Q. I think that's all.

(Testimony of William S. Regan.)

Redirect Examination

By Mr. McKelvy:

Q. Doctor, did you know of any work being done with Elgetol [307] in the east at the time, in 1944, we'll say, or '45?

A. There is work being done back there. In fact—do you refer to Elgetol?

Q. Yes.

A. Yes, there is work being done back there, but there's a great deal of use, that is, grower use.

Q. And some work been done by extension departments? A. Yes.

Q. Cornell University done any work on it?

A. Yes.

Q. How many years had it been used in the east before 1944?

Mr. Hawkins: I think, your Honor, that the testimony should be directed as to whether or not this use and experimentation is in connection with use of Elgetol as thinner, or a mildew control.

The Court: I will overrule the objection.

Redirect Examination

(Continued)

Q. How many years has it been used in the east, before 1944? A. Six years, at least.

Q. Six years. Well, you mentioned Tom Strand. Is he available now to come here to testify?

A. Mr. Strand is in Mexico, I understand, and is not available, otherwise he would be here.

(Testimony of William S. Regan.)

Q. Are you a salesman, Doctor?

A. No, I am not. [308]

Q. Do you ever try to sell the products for this company? Ever solicit?

A. I've never taken an order in my life, the book order.

Q. They have other men that act as salesmen?

A. They do, yes.

Recross-Examination

By Mr. Hawkins:

Q. Was this work that you're speaking of that is being done back east in connection with thinning?

A. I think there is work being done on not only thinning, but for disease control as well.

Mr. Hawkins: I think that's all.

Redirect Examination

By Mr. McKelvy:

Q. One other question on that, Doctor. Was the work being done during these six years of use, using Elgetol, was that put on the label referred to in Exhibit J?

A. I think there is no reference to it on that label.

(Whereupon, there being no further questions, the witness was excused.)

The Court: The court will recess for five minutes.

(Short recess.)

(All parties present as before.)

(Whereupon, the following proceedings were had without the presence of the jury.)

The Court: Mr. McKelvy, I just looked at these [309] affirmative defenses, and if you will check me with the pleadings, I think what you wish to withdraw is the second affirmative defense in each case.

Mr. McKelvy: That is correct. So the record has it clear, the defendant in each of the cases now on trial moves to withdraw the second affirmative defense, the defense setting out the label on the can containing Elgetol "30."

The Court: The motion is granted. Bring in the jury.

(Whereupon, the following proceedings were had within the presence of the jury.) [310]

L. P. BATJER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Your name is Dr. L. P. Batjer?

A. That's right, sir.

Q. Where do you live, Doctor?

A. Wenatchee.

Q. What is your business?

A. I am a research horticulturist for the United States Department of Agriculture.

(Testimony of L. P. Batjer.)

Q. How long have you been with the United States Department of Agriculture?

A. About twelve years.

Q. Would you give us something of your preparation and education in your particular line?

A. Well, I was reared on a fruit farm in the middle west. I went to the University of Texas and Missouri, took graduate work at Michigan State, and took a Doctor's degree at Cornell University in New York State. Following that I was horticulturist with New York State and with West Virginia State.

Q. Speak a little louder, please. [314]

A. I was horticulturist with New York State for three years, following the completion of my work, and I was horticulturist for two years with the West Virginia experiment station, and following that I went with the United States Department of Agriculture and was stationed at Beltsville, Maryland, which is their eastern or national headquarters.

Q. Are you familiar with Elgetol?

A. Yes.

Q. Do you know whether Elgetol had been used in the east as a thinner prior to 1944?

A. Yes.

Q. How long had it been used in the east prior to 1944?

A. Experimentally it was used in 1940, I believe, and some commercial use followed that in 1941. In 1942 and 1943 there was, I would say, considerable commercial use on certain varieties.

(Testimony of L. P. Batjer.)

Q. Had some work been done on Elgetol at Cornell University under Dr. Hoffman's supervision? A. Yes.

Q. When did you come to Wenatchee, Doctor?

A. In March of 1945.

Q. Have you had occasion to work with Elgetol since being in Wenatchee? A. Yes. [315]

Q. Incidentally, I take it in your work you get over here in the Yakima Valley, too, do you, some?

A. Yes.

Q. What type of work have you done with Elgetol?

A. Our work has primarily been, or entirely, I should say, with the use of Elgetol to thin the crop during the bloom stage.

Q. And when do you apply the Elgetol? What period during the bloom stage?

A. We apply it principally as a blossom spray, being applied at when an occasional petal would fall, from the earliest opening bloom.

Q. Have you applied it into the so-called calyx, when fifty per cent of the bloom has fallen?

A. With some varieties we have. We've done it with Jonathan and golden Delicious when perhaps fifty per cent of the petals were down.

Q. Have you received any injury to the foliage, any commercial damage, so-called, by the use of Elgetol? A. None whatever.

Q. What are the limits, so far as the mixture is concerned, that you follow?

A. The concentration?

Q. Yes.

(Testimony of L. P. Batjer.)

A. I would say it is within the range of one pint to one [316] quart per hundred gallons.

Q. In other words, you have used this in between there? A. Yes.

Q. Doctor—let me ask you first, so that it will be clear; did you receive any injury at any time when you used the mix that is one quart per hundred gallons?

A. No; by injury, when you say injury, I should qualify that, perhaps. We do get the burning of petals, which is a characteristic of the spray, and then occasionally we may get a slight mottling, it looks like a mottling effect on some of the leaves, particularly on the inside portion of the tree. It is not any more injury than you would get, I should say, with many other spray materials, and certainly not of commercial significance.

Q. Doctor, assuming you would put on Elgetol on, we'll say, a Jonathan tree, because I guess they have the mildew most, that is pretty badly infected, for the purpose of controlling mildew. Would it make any difference as to the results or effect whether or not that was a tree without mildew, or one badly infected with it, in your opinion?

A. Are you speaking from the standpoint of thinning? Would it make any difference how much thinning you would get?

Q. No, the standpoint of mildew control.

A. Well, I would say that you could get more injury with a [317] seriously infected tree if it were sprayed with Elgetol; you perhaps would.

(Testimony of L. P. Batjer.)

Q. And why would you say that?

A. Well, a seriously infected mildewed tree is a sick tree, in a sense. The foliage is certainly not normal, and you get, we think, but haven't measured it experimentally, we get more absorption of the spray material through a diseased tissue as contrasted with a healthy tissue.

Q. Now, so far as the thinner is concerned, does the application of Elgetol kill the so-called bud, or does it cause it not to pollenize?

A. It prevents it from setting, after pollination takes place, by either killing the pollen, or killing the entry that the pollen has to the vital part of the flower, that is necessary for fruit set to take place. It kills it in two ways, and then perhaps another important effect is shock, that is, temporarily causing the tree to not function normally, and indirectly affecting set in that way.

Q. Doctor, what would you say as to whether or not the chance of foliage injury is any different whether the Elgetol is applied in the calyx or in the full bloom?

A. On foliage injury?

Q. Yes, sir. [318]

A. Well, I would say that we haven't gotten, as I said before, we haven't gotten any injury applied in either stage. I would think that the amount of injury that one would get might depend more on the weather following than on differences in time.

Q. I see.

Mr. McKelvy: You may cross-examine.

(Testimony of L. P. Batjer.)

Cross-Examination

By Mr. Hawkins:

Q. Did you do any work with Elgetol as a mildew control, Doctor?

A. That was only incidental, with observations only. Our primary objective was thinning.

Q. You did not work with Mr. Reeves in his experiments with Elgetol as a chemical preventative of mildew? A. No.

Q. You say that Elgetol shocks the tree. What do you mean by that?

A. Well, that's a term that isn't easily defined. We probably use it loosely. In other words, we seem to get more fruit set on a tree sprayed with Elgetol than we can account for by the failure of the blossoms to become pollinated. We let enough time elapse so that we are fairly sure that pollination has pretty well taken place with all flowers. We still get some thinning, and we can't account for it in any other way [319] except to perhaps call it general shock, whatever that is; it is a very loose term, I will admit.

Q. Well, I was wondering if this extra thinning that you're speaking of is due to the burning action of the Elgetol on the tree?

A. Well, if it is a burning action, I would say that it's been invisible, that is, we can't see it, and so in that sense it would not be a burning, no.

Q. Yes, but if there is no evidence of burn, and yet it causes more thinning, then you would expect——

(Testimony of L. P. Batjer.)

A. Well, then, we would expect, from the standpoint of its action as a pollicide, or killing the pollen, but I should make it clear then that in all of our work here in the west we haven't overthinned any trees, so our thinning is not really adequate enough; it usually has to be supplemented with hand thinning.

Q. Does your work involve diseases such as mildew? A. No.

Q. What is the name that you ascribe to that type of work?

A. Well, that would come—primarily a pathologist problem.

Q. A plant pathologist deals with mildew and so forth?

A. Deals with diseases of the plants.

Q. And your type of work is called what?

A. Called what?

Q. Yes, what is it called? [321]

A. Well, physiological investigations, or there is a very indefinite line of distinction between the two; one blends into the other, but mainly we work on problems that do not pertain to diseases, though we may work cooperatively with another person who is a pathologist, and sometimes our work is closely connected.

Q. Well, when you applied the Elgetol or had it applied in these experiments that you were running, you applied it in the full bloom stage, or very shortly after?

A. At the full bloom stage, and in many cases

(Testimony of L. P. Batjer.)

where we were spraying Golden Delicious and Jonathans this year, we would put on another spray in the early stage in the calyx.

Q. In the early stage; but you have in your experiments applied no pink spray, is that right?

A. No pink spray, no.

Q. And you have applied no true calyx spray?

A. Well, I would say if you accept the definition of calyx as when fifty per cent of the petals are down, we have applied some in the true calyx, but on the early end of it. In fact, when we sprayed our Jonathans in the past season the grower put on his calyx spray on those same trees an hour after we sprayed, so he was actually engaged in his calyx spray that day.

Mr. Hawkins: That's all. [322]

Mr. McKelvy: That's all. You may be excused; I guess there is no objection [392].

(Whereupon, there being no further questions, the witness was excused.)

ELMER MILAND

called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. Elmer Miland.

Q. And where do you live, Mr. Miland?

A. On Smith View, six miles west.

(Testimony of Elmer Miland.)

Q. Six miles west of Yakima? A. Yes, sir.

Q. And what is your occupation, sir?

A. Fruit grower.

Q. And how long have you been engaged in that business?

A. All of my life, since I was old enough to.

Q. I beg pardon? [357]

A. All my life since I was old enough to; I was raised in fruit.

Q. You own your own orchard now?

A. Yes.

Q. And how long have you owned that place?

A. This place, since '32.

Q. What do you have this place planted to?

A. Well, there's Jons, Romes, and Winesaps.

Q. Do you have a mildew problem in this orchard? A. Yes, I do.

Q. In all varieties?

A. Not in the Saps so much; I have it just a little in that. I have quite a lot in the Romes and quite a lot in the Jons.

Q. What do you ordinarily use to control mildew?

A. Well, lime and sulphur has always been the old reliable stand-by, always been used.

Q. And at what stage of the bloom do you apply lime and sulphur?

A. Well, it's in the pink and calyx. Some follow on through into the first cover with lime and sulphur.

Q. Have you ever used Elgetol?

A. I used it in '45.

(Testimony of Elmer Miland.)

Q. For mildew? A. Yes, sir. [358]

Q. Have you ever used Elgetol as a thinner?

A. No.

Q. What strength of Elgetol did you use in your mildew control in 1945?

A. Well, I used a pint and a half in the pink, and half a pint in the calyx.

Q. You applied two sprays, one in the pink and one in the calyx, is that right?

A. Yes; there's about twelve trees on the end of the place that I just put on the one spray, a calyx spray.

Q. And what effect did Elgetol have on your orchard, Mr. Miland? A. Well, it burned it.

Q. What effect did it have on your crop in 1945?

A. I didn't have any Jonathans, and I forget the figures, but I think less than half of Romes.

Q. Did you spray your Winesaps with Elgetol?

A. No.

Q. Did you have a good crop of Winesaps in 1945?

A. Yes, I think so. I can't just remember what I had that year.

Q. You said that the Elgetol burned the orchard. Would you describe to the jury what you mean by that?

A. Well, they turned them brown, and they just died and fell off, and the fruit itself, the stems, turned yellow, [359] and the fruit dropped off.

(Whereupon, a photograph was marked Plaintiffs' Exhibit "K" for identification.)

(Testimony of Elmer Miland.)

(Whereupon, a photograph was marked Plaintiffs' Exhibit "L" for identification.)

Direct Examination

(Continued)

Q. Mr. Miland, I am handing you plaintiffs' identification L. Will you state what that is? Is that a photograph? A. Yes.

Q. Of what?

A. That's one Jonathan tree that I didn't spray with Elgetol.

Q. Either in the pink or in the calyx?

A. No; no spray at all.

Q. No spray at all; and I am handing you plaintiffs' identification K. Will you state what that is?

A. That's a tree in the middle of the orchard, average tree, that was sprayed.

Q. That's a photograph of a tree?

A. That's right.

Q. And is that picture typical of the trees on your orchard sprayed with Elgetol? A. Yes.

Q. And plaintiffs' identification L is typical of the trees in your orchard not sprayed with Elgetol, is that right? A. Yes, that's right. [360]

Mr. Hawkins: I will offer plaintiffs' identification K and plaintiffs' identification L in evidence.

Mr. McKelvy: We object to the offer of each exhibit for the reason it is collateral matter. It is not rebuttal testimony, and is not relevant to the issues here between these parties at this time.

(Testimony of Elmer Miland.)

The Court: Was there any mention of when those were taken, Mr. Hawkins, approximately?

Direct Examination

(Continued)

Q. Can you state approximately when plaintiffs' identification K was taken?

A. Yes, just a few days before harvest.

Q. A few days before harvest? A. Yes.

Q. And when was plaintiffs' identification L taken? A. Same day.

The Court: 1945? A. Yes.

Mr. McKelvy: A further objection, that a photograph in this part of the country would not necessarily have any probative value as to the conditions in some other part of the valley, having in mind your Honor stopped me ten miles away.

The Court: It is in the area. They will be admitted for the purpose of illustrating the testimony.

(Whereupon, Plaintiffs' Exhibit K for identification was admitted in evidence.)

(Whereupon, Plaintiffs' Exhibit L for identification was admitted in evidence.)

Mr. Hawkins: The one in my left hand is the tree that has been sprayed with Elgetol, and the one in my right hand is the tree that has not been sprayed with Elgetol. You may cross-examine.

Mr. McKelvy: Should I go ahead, or wait until the jury has looked at the pictures?

(Testimony of Elmer Miland.)

The Court: Well, I think perhaps you had better wait until they have looked at them.

A Juror: Is this the same kind of a tree?

Witness: Yes, sir.

The Court: Are those both Jonathan trees?

Witness: Yes, they are.

Mr. Hawkins: Those pictures were taken at the same time, were they not?

Witness: Yes, sir.

A Juror: Are these two trees in approximately the same section of the orchard?

The Court: Just a moment; ask the Court the questions.

A Juror: I want to know if these two trees are approximately in the same section of the orchard.

The Court: How far apart were the trees?

Witness: I can look that up here. Let's see, that one was number 1; that's the second tree in the first row; that would be the west row, second tree in the west row. That would be the first row of the Jonathans. Number 4 in the ninth tree in the third row; that would be seven trees away, or approximately.

The Court: Can you connect these numbers up with your exhibit here, Mr. Hawkins? Do you know which is which?

The Clerk: Number 1 is L.

The Court: You can wait until they get through. It's just a matter of fixing it for the record.

(Testimony of Elmer Miland.)

Mr. Hawkins: The picture you have just referred to as number 1 is plaintiffs' Exhibit L, is that right?

Witness: Yes.

Mr. Hawkins: And the picture you just referred to as Number 4 is plaintiffs' Exhibit K?

Witness: Yes.

The Court: You may cross examine, Mr. McKelvy.

Cross-Examination

By Mr. McKelvy:

Q. You knew that Elgetol was a new product in the valley? A. New?

Q. Yes, new, n-e-w?

A. There might be two answers to that question. [363]

Q. Well, you only made one answer to it at the other trial; that's what I'm getting at. What is your answer?

A. Well, it is a new product.

Q. Sir? A. It is a new product.

Q. And you knew that it had been used in the valley the year before only, didn't you?

A. I had heard it had.

Q. Pardon? A. I had heard it had.

Q. And you knew it had been used as a thinner in '44? A. Yes.

Q. And you knew that when it was used as a thinner it was noticed that it controlled mildew satisfactorily in 1944?

(Testimony of Elmer Miland.)

A. That's what I was told.

Q. All right; was there any reason that you wanted to use something besides lime and sulphur for mildew control in 1945?

A. Yes, I wanted to follow up with summer oil sooner; start the season with oil sooner.

Q. Now, the photographs you have taken, you mentioned one of them is on the west row. Would that be on the outside row?

A. No, that's the inside row. The Jonathans are on the edge of my place, and this number 1 was taken on the first [364] row.

Q. Well, would there be a row of trees on each side of that tree?

A. Of Jonathans, on three sides of it.

Q. Well, we'll get them here, and know what we're talking about. Take Exhibit L. That's the one you say was not sprayed?

A. Yes.

Q. Now, are there trees on three sides of that?

A. Jonathans.

Q. And how about the other one, Exhibit K?

A. That was Jonathans on all sides of that.

Q. Jonathans on all sides of that. What would be the comparative age of the two trees in L and K?

A. Same age.

Q. One of them is a much larger tree than the other, isn't that correct?

A. I don't think so.

Q. Did you take these pictures?

A. No, I didn't.

Q. Doesn't K show a much larger tree than L?

(Testimony of Elmer Miland.)

A. It may be, the way it was taken. I don't think that there's very much difference in the size of the trees. They're all the same age.

Q. Did you spray the tree that is shown here in K, the one [365] you say you used Elgetol on, during the balance of the season, after you used Elgetol on it? A. No.

Q. In other words, after you used this calyx, you let it go to the bugs and worms, isn't that right?

A. I started the first cover, and was blowing the apples off the trees, so I decided it was time to quit.

Q. And how many sprays did you put on "L" after? A. You mean lead sprays?

Q. Any kind of sprays?

A. I think about four leads.

Q. Or anything else? A. That's all.

Q. In other words, you followed through and took care of the tree in "L" the whole season, but you abandoned one in "K" that you say you used Elgetol on, after you saw it wasn't going to have a crop?

A. You can't do that in an orchard.

Q. You didn't spray it any more?

A. I didn't spray it, no. I irrigated.

Q. You didn't spray any more? A. No.

Q. Now, if you stopped spraying a tree, whether you used Elgetol on it or not, in the calyx, and didn't use any more sprays during the season, it would make a little [366] different looking tree by harvest time?

A. It should look better.

(Testimony of Elmer Miland.)

Q. It would be different, anyway?

A. Might.

Q. Might? A. Might look better.

Q. Might look better, but wouldn't look worse?

A. I wouldn't think so.

Q. But you would expect them to show different kind of pictures, wouldn't you, at harvest time?

A. I say, it might look better if it was not sprayed and hadn't been sprayed with Elgetol.

Q. Now, who picked the two trees to take pictures of?

A. The photographer and another gentleman here in town.

Q. Well, were you there? A. Yes.

Q. Did you have anything to do with it?

A. No.

Q. Not a thing?

A. No; I followed along and let them pick the trees and take the pictures.

Q. Was the fellow with the photographer interested in the matter? A. Yes.

Q. Did you pick somewhat extremes, in order to get a comparison, [367] or a radical comparison?

A. No; we took nine photographs altogether.

Q. Now, when you applied the first spray in the pink, did you notice what you thought was a burn or damage before you started putting the calyx on?

A. Yes.

Q. You did. Did you go clear through all of your trees, then after that, with the calyx?

A. Yes.

Mr. McKelvy: That's all.

(Testimony of Elmer Miland.)

Redirect Examination

By Mr. Hawkins:

Q. What prompted you to go ahead with the calyx spray after you noticed burns in the pink?

A. I was advised to do it.

Mr. McKelvy: Just a minute. As to what conversation was had, the court has ruled that on counsel's objection it can't go, so it surely still upholds.

Mr. Hawkins: Counsel has certainly opened the door. He's left the inference that this man foolishly went ahead and sprayed, and he said he was advised to do it.

The Court: He said he was advised to do it. Now, let's let it go at that.

Mr. Hawkins: That's all. [368]

Recross-Examination

By Mr. McKelvy:

Q. Oh, I just want to ask one more question, that's all. You have a suit pending against California Spray-Chemical Corporation at the present time that hasn't been tried, haven't you?

A. That's right.

Redirect Examination

By Mr. Hawkins:

Q. And Mr. McKelvy is defending that suit, isn't he? A. I don't know.

Mr. McKelvy: I hope I will be hired, but I don't know; I may lose my job after this one.

(Whereupon, there being no further questions, the witness was excused.)

H. K. STAHLER

one of the plaintiffs, recalled as a witness in his own behalf, in rebuttal, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Mr. Stahler, Dr. Regan testified this morning, or perhaps it was yesterday afternoon, that he advised you to spray the two rows of Saps alongside the Jonathans in your orchard to control the mildew, and that he did not tell you to spray any of the other Winesaps. What do you have to say about that?

A. Well, he told me to spray the two rows by the Jonathans for a precaution so that the mildew wouldn't spread any further, and then he was out there with another man on a Wednesday, and I asked him about spraying those old trees for thinner, and he said you had about two or three days to wait yet, and I asked him how long it took to do that job, and he said about two days. He said that will bring you about Saturday and Sunday, and he says "You don't want to spray on Sunday"; that's the reason I remember, because we were joking about it, so I sprayed them Saturday. [379] Sunday we didn't spray.

Mr. Hawkins: You may cross examine.

(Testimony of H. K. Stahler.)

Cross-Examination

By Mr. McKelvy:

Q. You sprayed them Saturday for a thinner?

A. Yes, sir.

Q. That's the Winesaps?

A. That's the Winesaps.

Q. Other than the two rows?

A. Other than the two rows?

Q. And applied it to them to get a thin?

A. Yes.

Mr. McKelvy: That's all.

(Whereupon, there being no further questions, the witness was excused.

E. A. EMERSON

one of the plaintiffs, recalled as a witness in his own behalf, in rebuttal, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Dr. Regan testified that when he was on your Gromore place he called your attention to an iron deficiency and that that was causing your leaves to turn yellow. What do you have to say about that, Mr. Emerson?

A. The conversation that we had about any deficiency was about a zinc deficiency; this Mr. Stroud, I believe was the name of the party with him——

(Testimony of E. A. Emerson.)

Q. Strand? [380]

A. Strand, correct——

Mr. McKelvy: Well, I don't know what he's going to say, but I think the question should be answered so I can object. This is rebuttal, after all.

The Court: Perhaps you had better ask it again.

Direct Examination

(Continued)

Q. The question I asked was what he had to say about Dr. Regan's testimony concerning the iron deficiency.

A. There was nothing said about iron deficiency.

Q. Was anything said about any deficiency?

A. Yes.

Q. What was that?

Mr. McKelvy: I object to that as not rebuttal testimony; part of the case in chief. It's been covered.

The Court: Overruled.

Direct Examination

(Continued)

Q. You may answer.

A. During the conversation the remark was made by one or the other of the gentlemen——

Mr. McKelvy: Now, I object to that, because it certainly would be new matter, as to anything Mr. Strand may have said. There's no claim here in the case in chief that Strand said anything.

(Testimony of E. A. Emerson.)

The Court: This was in the presence of Dr. Regan?

Mr. McKelvy: Yes, but it's rebuttal. Now, it [381] couldn't possibly be rebuttal, when we didn't bring out anything about what Strand said to anybody.

The Court: I think it pertains to the same matter. You may answer that; I'll overrule the objection.

Direct Examination

(Continued)

Q. You may go ahead.

A. Begin where I quit?

The Court: Yes.

A. The remark was made that there seemed to be a zinc deficiency in the trees, causing a yellowing of the trees generally, or the foliage on the trees. That was referred to as a possible cause of the severe burn that the trees showed, or that the foliage on the trees showed, and that the blossoms showed, and I asked, directing my remarks to either or both, if there was anything that they had they could recommend to overcome that deficiency, and they said that some summer zinc spray such as Delmo-Z could be applied in a first cover spray that would probably give me some—give me the desired results; that that spray should be used in the first cover, and not in the calyx. Before they answered that question I asked them if that should be applied in my next spray, or the calyx spray, and they agreed

(Testimony of E. A. Emerson.)

that I should use the Elgetol in the calyx spray, which would have been, which was my next spray to apply, to be [382] applied within a very few days, and on the first cover spray following the calyx, to use the Delmo-Z, in my first lead cover spray.

Q. Referring to the yellow condition of the leaves, what was their condition prior to the application of the pink Elgetol spray?

Mr. McKelvy: Object to that as not rebuttal. After all, the season was moving along, too. You're raising a new issue here.

The Court: Overruled.

A. So far as I could tell, there was a normal condition so far as the color of the leaves were concerned, before any application of any spray was applied.

Q. By the way, the leaves come out first, before the blossoms do, on an apple tree? A. Yes.

Q. So that you have a chance to observe those, in fact, before the blossoms come out?

A. That's right; that's the idea in applying a pink spray. The blossom pod or cluster is enclosed within the leaves. The leaves open up first, and have to be exposed all around this blossom and also in the terminal growth before there is any pink that can show up in the blossom part. The leaves were normal so far as I could determine. [383]

Q. As to color? A. As to color.

Q. And what did you observe as to the color of the leaves after the first Elgetol application?

A. Well, there was a general yellowing of the foliage.

(Testimony of E. A. Emerson)

Q. Now, Dr. Regan has testified that one of the principal items that you three folks talked about was bloom thinning. What do you have to say about that?

A. Dr. Regan and I never discussed bloom thinning. I've never at any time been interested in bloom thinning. My——

Mr. McKelvy: I think the question's been answered.

The Court: Yes, that's right.

Direct Examination

(Continued)

Q. Dr. Regan testified that he saw you out at your Tieton and Gromore places, and then he saw you once more later in the year, down at his office. Now, how many times have you talked with Dr. Regan?

Mr. McKelvy: Well, that's not rebuttal. He may have talked with him a lot of times in 1946 and 1947.

Mr. Hawkins: In the year 1945.

The Court: I'll overrule the objection. I think he's testified to that before, but go ahead.

A. I really don't have a record of the number of times that [384] I have talked with Dr. Regan. I can think of or determine as many as five times that I talked with him personally in the spring of 1945, and I talked with him once by telephone.

Q. Now, Dr. Regan testified that you invited him out to your place, your orchard, to discuss the mat-

(Testimony of E. A. Emerson.)

ter of bloom thinning. Is that right? Go ahead and answer.

A. No, it isn't right.

Q. All right; Dr. Regan testified that no one would have used a mildew control on Winesaps or Delicious. Is that true in your orchard?

A. In my orchard I had mildew on all varieties of apples to some extent. It was worse in Jonathans. The planting in the orchard is a row of Jonathans and a row of Winesaps, with an occasional Delicious through the planting in a good portion of it, and my experience has been, the learning I've had with mildew, is that mildew will work on any of those varieties that I have. It seems to work more or thrive better on Jonathan than any other varieties that I have, but there's more or less in Delicious, Winesaps, even Bartlett pears.

Q. Have you sprayed your Winesaps and Delicious for mildew at any other time than 1945?

A. I sprayed in 1944, along late in the summer. That was the intention of the spray, was my idea, was to check [385] mildew.

Q. I mean have you made any other applications other than Elgetol for mildew control?

A. I have since 1945. Before that I never had really applied a mildew control of any spray as it was really recommended, or with that in mind, because I didn't feel that my problem was serious enough to go to the expense of a pink spray and a calyx spray on my home orchard.

Q. And that applied to your Jons as well as the other varieties?

(Testimony of E. A. Emerson.)

A. Yes; that's true. May I verify that.

Q. Since 1945 have you applied any mildew control?

A. I used lime and sulphur in 1946.

Q. On all varieties?

A. On Jonathans, in two sprays, and quite a few of the other varieties in one spray.

Mr. Hawkins: I think that's all. You may cross examine.

Mr. McKelvy: No questions.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Hawkins: The plaintiff again rests, your Honor.

The Court: The court will take a ten minute [386] recess before proceeding further.

(Short recess.)

(All parties present as before.)

(Whereupon, the following proceedings were had without the presence of the jury.)

The Court: I'm not sure that I waited for you to rest, Mr. McKelvy.

Mr. McKelvy: I have just a little bit; it will only take a few minutes, a couple of minutes, probably.

The Court: All right, call in the jury.

(Whereupon, the following proceedings were had within the presence of the jury.)

WILLIAM S. REGAN

recalled as a witness on behalf of the defendant, in sur-rebuttal, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Dr. Regan, is zinc a remedy for chlorosis?

A. Zinc is not a standard remedy for chlorosis.

Q. And I believe chlorosis, you said, was the yellow leaf you saw, yellow leaf condition?

A. Yellow leaf condition.

Q. About calyx time, are there certain leaves that are yellow, that is normal?

A. In the early season, what we call the primary leaves, later they don't go to full development, they are retarded in growth and turn yellow and finally drop off. [387].

If a Jonathan tree is not sprayed after the spray in the calyx, I believe you heard testimony about the Miland tree, and pictures there, what ordinarily would happen to the tree? What would it look like, compared to a tree that is sprayed during the season, at harvest time?

A. Our experience has been that an unsprayed tree becomes very shabby by fall, due to mite infestation. If you have young trees in among your regularly sprayed trees, and you don't spray them, by fall they look pretty shabby.

Q. Does the fact that a crop is hanging on one tree, and there is no crop on another tree, make the two trees appear different in any way?

A. Yes, they appear quite different in appearances.

(Testimony of William S. Regan.)

Q. How? What do you mean?

A. Well, the tree without a crop sort of clusters up and grows up straight, and the tree with a crop hangs down and looks fuller.

Mr. McKelvy: That's all.

Mr. Hawkins: No questions.

(There being no further questions, the witness was excused.)

Mr. McKelvy: The defendant rests.

The Court: The jury will retire. [388]

(Whereupon, the following proceedings were had without the presence of the jury.)

Mr. McKelvy: Comes now the defendant in each of the cases now on trial, all parties having rested, and at this time renews its challenge to the legal sufficiency of the evidence in each of the cases, and respectfully asks the court to direct the jury to return a verdict in favor of the defendant in each case as a matter of law, on the same grounds assigned at the time of the challenge and the motion for non-suit at the close of the plaintiffs' case, and on the further grounds that as the evidence now stands, all being in, it appears that the plaintiffs are guilty of contributory negligence or assumption of risk, which I conceive to be the same thing, according to the holdings, in that this product was used in apparently many different ways. We have the further fact that the plaintiffs here purchased the Elgetol in a sealed can or container, and neces-

sarily knew that the use they were making of the product was beyond the label on the container, because they would be presumed to—well, I guess the evidence shows that there isn't much dispute about it; the further ground that the plaintiffs have failed to show with reasonable certainty that the use of Elgetol in this case was the proximate cause of the damage they complain [389] of, and further, that the plaintiffs have failed to prove their damages in each case to that degree required by the law, namely, with a reasonable certainty.

(Whereupon, Mr. McKelvy addressed the Court in support of his motions on behalf of the defendant, and Mr. Hawkins addressed the Court in opposition to the motions of the defendant.)

The Court: One of the reasons that the court deferred making at least a final ruling on this very troublesome question is because I wanted additional time to re-examine these cases and read the cases and study the cases cited by the plaintiffs. As Mr. Hawkins has pointed out, without question there are distinguishing points in fact between this case and the cases that have been decided by the Supreme Court of this state in cases similar to this. There isn't any case on all fours, it's true, and you rarely get such cases, but I think as I read them, the cases of the Supreme Court beginning with the Mazzetti case, decided by Judge Chadwick, do lay down a very easily followed rule with reference to cases of this kind, where someone who purchases

an article for use is damaged by reason of its use, but has not made the purchase from the person from whom he seeks to recover; in other words, where there is no sale or no privity between the one who is [390] injured and the one from whom he seeks to recover for his injuries.

The principle that was announced in the Mazzetti case, and that case has been followed since that time, was that in circumstances such as this case a manufacturer or distributor will not be liable to anyone except his immediate vendee. That is the general rule. In other words, for a person to recover on implied or expressed warranty that the article is suitable for the purpose intended, there must be direct relationship or privity between the two, else there can be no recovery; then Judge Chadwick in the Mazzetti case sets out what are the exceptions, and those exceptions have been the basis for the subsequent cases that have been decided, and have been cited and discussed here.

Generally speaking, in order to recover where there is no privity, there must be fraud or deceit or there must be an article imminently dangerous, either imminently dangerous or an article made dangerous by reason of faulty construction. There must be either fraud or deceit, it must be an article imminently dangerous, or negligence with respect to an article not imminently dangerous, either in faulty construction or in the method of sale.

Now, the line of distinction, it seems to me [391] in principle and reasoning if not directly in holding, between the Washington cases and the cases

upon which plaintiff relies, is that when the Washington State Supreme Court talks of articles imminently dangerous, or made so by faulty construction or negligence, they are talking about a danger to human life or limb, a menace to human safety, and they limit the rule, or have never extended it beyond that, and the very reasoning upon which the cases are based indicates that it would not be further extended.

There is a special exception for those cases, for the reason they are different, they involve human safety; a matter of public policy is involved. That's what Judge Grady is talking about so extensively in his opinion in the Cochran vs. McDonald case. The DuPont vs. Beriden and Ebers vs. General Chemical Company cases go on and extend that to articles dangerous to property. In doing so, however, they discuss the same questions and cite the same cases that, generally speaking, the Washington State Supreme Court does, but they just simply take a different position on the question. They begin by saying the question is whether or not a vendor or manufacturer of articles is liable to a third person with whom he has no contractual relations for negligence in the manufacture or sale of the article, [392] but in the Ebers case, which cites and relies upon the DuPont case, the court points out that it does not make much difference, really, whether you call this the exceptions, with which the court is dealing, an exception to the implied warranty rule, or the negligence rule, because they say that after all, negligence and implied

warranty are practically the same thing as they are dealing with it there.

In other words, I think that the Supreme Court of our state, as I recall, Judge Chadwick expressly said in the Mazzetti case that in these circumstances there can only be recovery for express or implied warranty, and only recovery if there is no privity under these exceptions, which he states, and the court in its subsequent holdings has foreclosed this type of actions, it seems to me, in its reasoning in applying and construing those exceptions.

I have, I won't say with reluctance, but with considerable hesitance, and only after very careful consideration, come to this conclusion. I think it is, however, the court's duty to apply the law as he finds it, and of course there is no question but what I am bound by the law of the State of Washington. The motions for directed verdict in each case will be granted.

Mr. Hawkins: The plaintiffs, of course, will be allowed an exception in both cases?

The Court: Yes, of course. You may bring in the jury.

The Clerk: Mr. Hawkins, to clear the record, you have not offered identifications D or E. I assume you want to withdraw them.

Mr. Hawkins: I'm not certain which they are. Yes, I will withdraw the offers of D and E, your Honor.

The Court: All right. The record will show that.

(Whereupon, the following proceedings were had within the presence of the jury.)

The Court: Gentlemen of the jury, I have relieved you of the responsibility of making a determination in this case, as the court has decided as a matter of law that the case must be decided in favor of the defendant here. As you know from serving on juries before, the function of the jury is to pass upon the facts; the function and responsibility of the court is to pass upon the law, and the court has come to the conclusion that under the law that applies in this case, assuming the facts to be as claimed by the plaintiffs, they are not entitled to recover, and I am going to appoint Mr. Shattuck as foreman of the jury and ask him just as a matter of form to sign these verdicts for the defendant. The procedure is what is known as the court [394] directing a verdict.

(Whereupon the foreman signed a verdict for the defendant in each of the cases now on trial.)

The Court: The verdicts will be received and filed, and the jury will be excused until tomorrow morning at ten o'clock. [395]

Yakima, Washington, March 7, 1947

RULING OF THE COURT ON PLAINTIFFS' MOTIONS FOR NEW TRIAL

The Court: I might say that the court went into this very thoroughly at the time of the trial, and made exhaustive independent examination of the cases. It is a question that I considered of considerable difficulty, however, I became convinced from an analysis of the cases that in an action such as this, where a purchaser of an article sues for damages by reason of injuries suffered in the use of it, that he must, under the Mazzetti case, which I think has never been overruled and has been subsequently followed, he must bring an action in the nature of an implied warranty action. It isn't based directly on contract, of course, because there is no direct contract between the parties, but there must be privity, and the purchaser must sue his immediate vendor and his immediate vendor only unless he comes within one of the three exceptions enumerated. I think the Supreme Court, as I view it, has indicated this case does not come within one of the three exceptions. I'll deny the motion for a new trial, and allow an exception, of course, to the plaintiffs. [396]

Mr. Hawkins: Is that required, to ask for an exception, your Honor? I assumed not.

The Court: I think not.

Mr. McKelvy: I have one in the formal order.

Mr. Hawkins: Mr. McKelvy, I wonder if we can stipulate into the record, these two cases were con-

solidated for the purpose of trial, and counsel, will you stipulate with me in the record that these two cases may be and are hereby consolidated for the purpose of appeal?

Mr. McKelvy: Yes, I will so stipulate. [397]

REPORTER'S CERTIFICATE

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States in and for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held on January 27, 28, and 29, 1947, at Yakima, Washington.

That the above and foregoing, consisting of three volumes, with pages numbered from 1 to 375, inclusive, contains a full, true and accurate transcript of the proceedings had therein, including all objections and the court's rulings thereon.

Dated this 19th day of March, 1947.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

[Endorsed]: Filed April 24, 1947. [398]

District Court of the United States, Eastern District
of Washington, Southern Division

No. 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION,
Defendant.

VERDICT

We, the Jury in the above-entitled cause, find for
the defendant.

D. O. SHATTUCK,
Foreman.

Filed Jan. 29, 1947. [400]

District Court of the United States, Eastern District
of Washington, Southern Division

No. 242

E. A. EMERSON, et ux.,

Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION,

Defendant.

VERDICT

We, the Jury in the above-entitled cause, find . . .

D. O. SHATTUCK,
Foreman.

Filed Jan. 29, 1947. [401]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION,
Defendant.

JUDGMENT

This matter having come on for hearing before the undersigned judge of the above-entitled court, sitting with a jury, all parties being present and represented by their attorneys of record, a jury was duly selected and sworn to try the issues in the case; that thereafter the plaintiffs' counsel made an opening statement to the jury following which the plaintiffs produced evidence in their own behalf and when the plaintiffs rested the defendant did challenge the legal sufficiency of the plaintiffs' evidence and moved the court for a dismissal of the complaint with prejudice; that following argument of counsel in connection with said motion the court denied the defendant's challenge and motion to dismiss the complaint with prejudice; that thereafter the defendant, through its attorneys, made an opening statement to the jury, adduced testimony on

behalf of the defendant following which the plaintiffs adduced testimony on rebuttal and following which the defendant adduced testimony on surrebuttal; that when all parties had rested the defendant renewed its challenge to the legal sufficiency of the evidence made at the close of the plaintiffs' case and moved the court at that time to direct the jury to return a verdict in behalf of the defendant as a matter of law; that following argument of counsel in connection with this motion the court granted said motion and did direct the jury to sign and return a verdict in behalf of the defendant; that thereafter the jury, in accordance with said instructions of the court, did sign a verdict [402] in favor of the defendant and against the plaintiffs and said verdict was duly read in open court and filed; now, therefore, it is hereby

Ordered, Adjudged and Decreed that the plaintiffs' complaint be and it is hereby dismissed with prejudice, the defendant to have its costs against the plaintiffs to be taxed herein.

Dated this 10th day of February, 1947.

SAM M. DRIVER,

United States District Judge.

Feb. 5, 1947.

Approved as to form:

KENNETH HAWKINS,

NAT. U. BROWN,

Attorneys for Plaintiffs.

Filed Feb. 10, 1947. [403]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 242

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,

Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

JUDGMENT

This matter having come on for hearing before the undersigned judge of the above-entitled court, sitting with a jury, all parties being present and represented by their attorneys of record, a jury was duly selected and sworn to try the issues in the case; that thereafter the plaintiffs' counsel made an opening statement to the jury following which the plaintiffs produced evidence in their own behalf and when the plaintiffs rested the defendant did challenge the legal sufficiency of the plaintiffs' evidence and moved the court for a dismissal of the complaint with prejudice; that following argument of counsel in connection with said motion the court denied the defendant's challenge and motion to dismiss the complaint with prejudice; that thereafter the defendant, through its attorneys, made an opening statement to the jury, adduced testimony on behalf of the defendant following which the plain-

tiffs adduced testimony on rebuttal and following which the defendant adduced testimony on surrebuttal; that when all parties had rested the defendant renewed its challenge to the legal sufficiency of the evidence made at the close of the plaintiffs' case and moved the court at that time to direct the jury to return a verdict in behalf of the defendant as a matter of law; that following argument of counsel in connection with this motion the court granted said motion and did direct the jury to sign and return a verdict in behalf of the defendant; that thereafter the jury, in accordance with said instructions of the court, did sign a verdict in favor of the defendant and against the plaintiffs and said verdict was duly read in open court and filed; now, therefore, it is hereby [404]

Ordered, Adjudged and Decreed that the plaintiffs' complaint be and it is hereby dismissed with prejudice, the defendant to have its costs against the plaintiffs to be taxed herein.

Dated this 10th day of February, 1947.

SAM M. DRIVER,

United States District Judge.

Feb. 5, 1947.

Approved as to form:

KENNETH HAWKINS,

NAT. U. BROWN,

Attorneys for Plaintiffs.

Filed Feb. 10, 1947. [405]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the plaintiffs above named and respectfully move the court for the entry of an order setting aside the verdict of the jury and granting plaintiffs a new trial upon the grounds and for the reason of irregularity in the orders of the court granting defendant's motions at the close of the giving of testimony in the trial of the above action and directing the jury to return a verdict for the defendant and for the reason and upon the grounds that error in law occurred at the trial, both of which grounds and reasons materially prejudiced the substantial rights of the plaintiffs.

The particular error relied upon by plaintiffs in moving for said new trial is the ruling of the court that lack of a direct contractual relationship or privity of contract between the plaintiffs and defendant constitutes a defense as a matter of law to plaintiffs' action based upon the negligence of the defendant in recommending and representing Elgetol as a mildew control when at such time defendant knew, or in the exercise of reasonable care should have known that Elgetol was not a mildew control but was in fact injurious and harmful to the growing trees and crop, and to plaintiffs' action based upon breach of warranty, express or implied, that Elgetol was a mildew control. [406]

This motion is based upon the pleadings and

papers on file herein, upon the evidence given at the trial, and upon the minutes of the court.

KENNETH C. HAWKINS,
NAT. U. BROWN,
Attorneys for Plaintiffs.

Service Acknowledged and Copy Received of Motion herein this 13th day of February, 1947.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,
By W. R. McKELVY,
Attorneys for Defendant.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORATION,
a Corporation,
Defendant.

MOTION FOR NEW TRIAL

Come now the plaintiffs above named and respectfully move the court for the entry of an order setting aside the verdict of the jury and granting plaintiffs a new trial upon the grounds and for the reason of irregularity in the orders of the court granting defendant's motions at the close of the

giving of testimony in the trial of the above action and directing the jury to return a verdict for the defendant, and for the reason and upon the grounds that error in law occurred at the trial, both of which grounds and reasons materially prejudiced the substantial rights of the plaintiffs.

The particular error relied upon by plaintiffs in moving for said new trial is the ruling of the court that lack of a direct contractual relationship or privity of contract between the plaintiffs and defendant constitutes a defense as a matter of law to plaintiffs' action based upon the negligence of the defendant in recommending and representing Elgetol as a mildew control when at such time defendant knew, or in the exercise of reasonable care should have known that Elgetol was not a mildew control but was in fact injurious and harmful to the growing trees and crop, and to plaintiffs' action based upon breach of warranty, express or implied, that Elgetol was a mildew control. [408]

This motion is based upon the pleadings and papers on file herein, upon the evidence given at the trial, and upon the minutes of the court.

NAT. U. BROWN,
KENNETH C. HAWKINS,
Attorneys for Plaintiffs.

Service Acknowledged and Copy Received of Motion herein this 13th day of February, 1947.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,
Attorneys for Defendant.

Filed Feb. 17, 1947. [409]

[Title of District Court and Cause.]

ORDER DENYING PLAINTIFFS' MOTION
FOR NEW TRIAL

This matter having come on for hearing before the undersigned upon the plaintiffs' motion for a new trial served and filed herein subsequent to the entry of a judgment dismissing the above-entitled action with prejudice entered on February 10, 1947, and the court having listened to argument of counsel in connection with said motion and being fully advised in the premises, and being of the opinion that said motion should be denied; now, therefore, it is hereby

Ordered and Adjudged that the plaintiffs' motion for a new trial be and it is hereby denied and the plaintiffs are allowed an exception to this ruling.

Dated this 7th day of March, 1947.

SAM M. DRIVER,

United States District Judge.

Approved as to form:

KENNETH C. HAWKINS,

NAT. U. BROWN,

Attorneys for Plaintiffs.

Filed Mar. 7, 1947. [410]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 242

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,

Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

ORDER DENYING PLAINTIFFS' MOTION
FOR NEW TRIAL

This matter having come on for hearing before the undersigned upon the plaintiffs' motion for a new trial served and filed herein subsequent to the entry of a judgment dismissing the above-entitled action with prejudice entered on February 10, 1947, and the court having listened to argument of counsel in connection with said motion and being fully advised in the premises, and being of the opinion that said motion should be denied; now, therefore, it is hereby

Ordered and Adjudged that the plaintiffs' motion for a new trial be and it is hereby denied and the

plaintiffs are allowed an exception to this ruling.

Dated this 7th day of March, 1947.

SAM M. DRIVER,

United States District Judge.

Approved as to form:

KENNETH C. HAWKINS,

NAT. U. BROWN,

Attorneys for Plaintiffs.

Filed Mar. 7, 1947. [411]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Consolidated Civil Nos. 240 and 242

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,
Defendant.

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,
Defendant.

NOTICE OF APPEAL

Notice Is Hereby Given That J. D. Keck and Harry K. Stahler, and E. A. Emerson and Lewis Emerson, husband wife, the plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgments entered in the above-entitled actions on the 10th day of February, 1947, and from order denying Motion for new trial entered on the 7th day of March, 1947.

The above-entitled cases were consolidated for

trial by stipulation, and were likewise at the close of the case by stipulation consolidated for appeal.

KENNETH C. HAWKINS,

NAT. U. BROWN,

Attorneys for Appellants, J. D. Keck and Harry K. Stahler, and E. A. Emerson and Lewis Emerson, Husband and Wife.

Copy of this Notice mailed to W. R. McKelvy and Skeel, McKelvy, Henke, Evenson & Uhlmann, Attorneys for Defendant, April 16th, 1947.

A. A. LaFRAMBOISE,

Clerk, U. S. District Court.

By THOMAS GRANGER,

Deputy.

[Endorsed]: Filed April 16, 1947. [412]

[Title of District Court and Cause.]

MOTION

Come now the plaintiffs and appellants and move the court to make an order to transmit to the Circuit Court of Appeals Plaintiffs' Exhibits H, J, K, L, F and G, such exhibits being photographs, printed material and physical objects and not being capable of adequate reproduction.

/s/ W. R. McKELVY,
SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,
Attorneys for Defendant.

/s/ KENNETH C. HAWKINS,
/s/ NAT. U. BROWN,
Attorneys for Appellants.

Copy of this Motion mailed to W. R. McKelvy and Skeel, McKelvy, Henke, Everson & Uhlmann, Attorneys for Defendant, April 1947.

.....,
Clerk.

[Endorsed]: Filed May 2, 1947. [413]

[Title of District Court and Causes.]

ORDER

This matter coming on in its order before the undersigned Judge of the above-entitled court upon the motion of the plaintiffs, which has been stipulated by the attorneys for the defendant, and the court being fully advised,

Now, Therefore, it is hereby

Ordered, Adjudged and Decreed that the Clerk of the Court be and he is hereby authorized to transmit to the Circuit Court of Appeals Plaintiffs' Exhibits H, J, K, L, F, and G, such exhibits being evidence not capable of adequate reproduction.

Done in Open Court this 2nd day of May, 1947.

SAM M. DRIVER,
Judge.

Presented by:

KENNETH C. HAWKINS,
Of BROWN & HAWKINS,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 2, 1947. [414]

[Title of District Court and Causes.]

ORDER

This matter coming on in its order before the undersigned Judge of the above-entitled court upon the motion of the plaintiffs pursuant to Rule 73, Subdivision "E" of the Rules of Civil Procedure, and the court being fully advised,

Now, Therefore, it is hereby

Ordered, Adjudged and Decreed that the plaintiffs herein be and the same are hereby authorized to file a Bond of Appeal herein within five days from the date hereof, which Appeal Bond shall be in the sum of \$250.00.

Done in Open Court this 2nd day of May, 1947.

SAM M. DRIVER,

Judge.

Presented by:

K. C. HAWKINS,

Of BROWN & HAWKINS,

Attorneys for Plaintiffs.

[Endorsed] Filed May 2, 1947. [415]

[Title of District Court and Causes.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents, that We, J. D. Keck, Harry K. Stahler, E. A. Emerson and Lewis Emerson, the plaintiffs above named, as Principal, and the American Surety Company of New York, a corporation organized under the laws of the State of New York, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto California Spray-Chemical Corporation, a corporation, the defendant above named in the just and full sum of Two Hundred Fifty Dollars (\$250.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 2nd day of May, 1947.

The condition of this obligation is such, that whereas, the above named defendant on the 10th **day of February, 1947**, in the above entitled action and court, recovered judgments against the plaintiffs above named for dismissal of the complaint and costs and disbursements.

And Whereas, the above named Principals have heretofore given due and proper notice that they appeal from said decision and judgments of said District Court of the United States for the Eastern District of Washington, Southern Division.

Now, Therefore, if the said Principals, J. D. Keck, Harry K. Stahler, E. A. Emerson and Lewis

Emerson shall pay to California Spray-Chemical Corporation, a corporation, the defendants above named, all costs and damages that may be awarded against plaintiffs on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars, (\$250.00), then this obligation to be void; otherwise to remain in full force and effect.

J. D. KECK,
By KENNETH C. HAWKINS,
His attorney,

HARRY K. STAHLER,
By KENNETH C. HAWKINS,
His attorney,

E. A. EMERSON,
By KENNETH C. HAWKINS,
His attorney,

LEWIS EMERSON,
By KENNETH C. HAWKINS,
Her attorney.

AMERICAN SURETY
COMPANY OF NEW YORK,
By GEORGE M. LEMON,
Attorney in fact.

Approved this 2nd day of May, 1947.

A. A. LAFRAMBOISE,
Clerk, U. S. District Court.

[Endorsed]: Filed May 2, 1947. [417]

[Title of District Court and Causes.]

STATEMENTS OF POINTS ON APPEAL

1. The United States District Court was in error in granting defendant's motion for nonsuit and a directed verdict at the close of the case, and in refusing to submit the case to the jury for the reason that the evidence and exhibits produced were sufficient to go to the Jury on the question of whether there was actionable negligence on the part of the defendant which negligence was the proximate cause of damage to the plaintiffs.

2. The United States District Court was in error in granting judgment to the defendant and refusing to grant a new trial for the plaintiffs for the reason that the testimony and evidence produced was sufficient to go to the Jury on the question of whether there was negligence on the part of the defendant, which negligence proximately caused damage to the plaintiffs.

3. The United States District Court erred in holding as a matter of law that privity of contract between plaintiffs and the defendant was necessary in order to make negligence of defendant actionable, under the circumstances of these cases.

4. The United States District Court erred in not holding that representations and recommendations of defendant to the plaintiffs that "Elgetol" was a mildew control, coupled with the failure on the part of the defendant to test said "Elgetol" with reasonable prudence under the circumstances, at a time when it knew or in the exercise of reasonable care should have known that the use of "Elgetol"

as a mildew control and its application as directed would likely result in damage to plaintiffs' crops, entitled plaintiffs to submission of the case to the Jury for the determination of facts, regardless of whether or not a direct contractual relationship existed between the plaintiffs and defendant.

/s/ KENNETH C. HAWKINS,

/s/ NAT U BROWN,

Attorneys for Appellants.

Service accepted and copy received thisday of April, 1947.

Attorneys for Appellee.

[Endorsed]: Filed May 13, 1947. [421]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the foregoing type-written pages, numbered 1 to 426, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein as called for by the designation of record on appeal filed by counsel for the Appellants, and by the supplemental designation of record on appeal filed by counsel for the Appellee, as the same re-

mains on file and of record in my office, and that the same constitutes the record on appeal of the Appellants, J. D. Keck and H. K. Stahler, and E. A. Emerson and Lewis Emerson, husband and wife, from the Judgment of the District Court of the United States for the Eastern District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that included in the transcript of record on appeal is a copy of all exhibits received in evidence in said cause, except Plaintiffs' Exhibits F, H, J, K and L, and Plaintiffs' Identification G. Said original exhibits F, H, J, K and L, and Plaintiffs' Identification G, are being transmitted pursuant to order of the District Court, Exhibit J, being sent under separate cover.

I further certify that the fees of the Clerk of this Court for preparing and certifying that portion of the foregoing typewritten record as called for in Appellants' Designation of record on appeal amount to \$31.50, and the same has been paid in full by Kenneth C. Hawkins of attorneys for Appellant.

I further certify that the fees of the Clerk of this Court for preparing and certifying that portion of the foregoing typewritten record on appeal as called for in Appellee's supplemental designation of record on appeal amount to \$10.10, and the same has been paid in full by W. R. McKelvy, of attorneys for Appellee.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

Yakima, Washington, in said district, this 19th day of May, 1947.

[Seal]

A. A. LaFRAMBOISE,

Clerk of said District Court,

By /s/ THOMAS GRANGER,

Deputy.

[Endorsed]: No. 11634. United States Circuit Court of Appeals for the Ninth Circuit. J. D. Keck and Harry K. Stahler, and E. A. Emerson and Lewis Emerson, husband and wife, appellants, vs. California Spray-Chemical Corporation, a corporation, Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed May 22, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11634

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY - CHEMICAL CORPO-
RATION, a corporation,
Defendant.

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,
Defendant.

ADOPTION OF POINTS ON APPEAL

Comes now the appellants and adopt the points on appeal filed in the United States District Court for the Eastern District of Washington. The appellants intend to point out and claim as error all such matters and all adverse rulings.

/s/ NAT U. BROWN,
/s/ KENNETH C. HAWKINS,
Attorneys for Appellants.

Copy mailed to W. R. McKelvy and Skeel, McKelvy, Henke, Evenson and Uhlmann, Attorneys for Appellee, June 24, 1947.

/s/ KENNETH C. HAWKINS,
Attorney for Appellants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed June 25, 1947.